IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 18

CITY OF DETROIT, a Michigan Municipal Corporation, and COUNTY OF WAYNE, a Michigan Constitutional Body Corporate,
Appellants,

vs.

THE MURRAY CORPORATION OF AMERICA, a Delaware Corporation, Appellee, and THE UNITED STATES OF AMERICA, Intervenor

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 36

CITY OF DETROIT, a Michigan Municipal Corporation, and COUNTY OF WAYNE, a Michigan Constitutional Body Corporate,
Petitioners,

vs.

THE MURRAY CORPORATION OF AMERICA, a Delaware Corporation, Respondent, and THE UNITED STATES OF AMERICA, Intervenor

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Brief of Appellee and Respondent

Victor W. Klein
William M. Saxton
Attorneys for Appellee
The Murray Corporation of America

INDEX

AUTHORITIES CITED

Decisions

STATUTES AND LEGISLATIVE HISTORY

REGULATIONS

OPINIONS, ADMINISTRATIVE RULINGS AND OTHER REFERENCES

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 18

CITY OF DETROIT, a Michigan Municipal Corporation, and COUNTY OF WAYNE, a Michigan Constitutional Body Corporate,
Appellants,

vs.

THE MURRAY CORPORATION OF AMERICA, a Delaware Corporation, Appellee, and THE UNITED STATES OF AMERICA, Intervenor

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 36

CITY OF DETROIT, a Michigan Municipal Corporation, and COUNTY OF WAYNE, a Michigan Constitutional Body Corporate,
Petitioners,

vs.

THE MURRAY CORPORATION OF AMERICA, a Delaware Corporation, Respondent, and THE UNITED STATES OF AMERICA, Intervenor

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Brief
of
Appellee and Respondent

JURISDICTION

Consideration of jurisdiction of appellants' appeal in Case No. 18 (No. 101, October Term 1956) was postponed by the Court until the hearing on the merits (R. 284). At the same time an order allowing certiorari was granted in Case No. 36 (No. 563, October Term 1956) (R. 284), thus affording review to appellants, as petitioners in the certiorari proceeding, of the questions raised on the merits of the appeal.

However, since the Court indicated that the question of jurisdiction was to be considered, it should be pointed out that—

No Question is Presented Which Gives this Court Jurisdiction of the Appeal

Appellants predicate jurisdiction of this appeal upon Section 1254 (2) of Title 28, U.S.C.A., which provides that this Court may review a judgment of the Court of Appeals

> "By appeal by a party relying on a state statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States . . ."

The Court of Appeals did not decide that the Michigan General Property Tax Law or the Charter of the City of Detroit, pursuant to which the taxes in question were assessed, were "invalid as repugant to the Constitution, treaties or laws of the United States," but held that under the partial payments clause in question the United States was vested with absolute title to the property in question and accordingly Murray had no interest in the property which could be sub-

ect to taxation. The validity of the ad valorem tax laws of he State of Michigan and of the City of Detroit have never een questioned in this litigation. The only real question has een whether absolute title (not merely a security title) was ested in the United States or in Murray.

Appellants have never contended that property of the nited States may be subjected to state ad valorem property axes and the Michigan statute has never been construed as ermitting the taxation of Federally owned property. Indeed, n his argument before the District Court counsel for the ity of Detroit stated:

> "And I might say that it is not the position of the City that it has the right to tax the property of the United States Government. But we contend that we did not do that in this case."[1]

n their joint Reply Brief in the Court of Appeals appellants irther stated that—

> "Neither the County nor the City has contended that these levies were specific taxes or that they were not **ad valorem** property taxes."

The District Court noted that—

> "There is no disagreement on the proposition that local government may not tax property owned by the Federal Government. Whether the personal property here as-

[1] Transcript of proceedings before Honorable Thomas P. Thornton, District Judge, March 11, 1954; page 76, on file as part of the record herein but not printed.

sessed was owned by the Federal Government in the sense that it could not be taxed at a local level is the issue." 132 F. Supp. 899-904 (R. 119).

Admittedly, the state and local taxing statutes imposing an ad valorem tax on property are valid. If title to the property was vested in the United States on tax assessment day, the property was constitutionally immune from such taxation. If title was not vested in the United States, there was no immunity.

The Court of Appeals merely applied Federal law to determine whether title to property produced for the sole ownership and use of the United States, in connection with the national defense, was in fact vested in the United States. *United States v. Allegheny County* 322 U.S. 174, 182 (1944), *Kern-Limerick Inc. v. Scurlock*, 347 U.S. 110, 121 (1954). Having so determined, the doctrine of Federal constitutional immunity undisputably obtains.

The authorities cited by Appellants in support of this appeal (pages 3-7 of Appellants' Brief) merely reaffirm the rule that an appeal will lie only where a state statute is held invalid as repugnant to the Federal Constitution and do not support Appellants' position here.

No question of the invalidity of a state statute as being repugnant to the Constitution, laws or treaties of the United States is here presented. We respectfully submit that this Court does not have jurisdiction of the appeal under 28 U.S.C. Section 1254 (2) and that the appeal should be dismissed.

STATUTES INVOLVED

While appellants[2] have cited a number of statutes as being "connected with the issues" presented by this case (pp. 7-8 of Appellants' Brief), only the following statutes, regulations and ordinances are directly involved and have any determinative effect with relation to the issues here presented.

Armed Services Procurement Act of 1947, Public Law 413 of 80th Congress, C. 65, 62 Stat. 21 et seq., as amended, 41 U.S.C.A., Sec. 151 et seq.

32 Code of Federal Regulations, 1949 Ed. (1950 Pocket Supp.) Part 400-428 (14 Fed. Register, p. 523).

Sec. 805.407-2 (A.P.R. 5-407(2)), (12 Fed. Register, p. 7693).

Compiled Laws of Michigan, 1948, Sections 211.1, 211.10 and 211.40 (Mich. Stat. Anno., Sections 7.1, 7.10 and 7.81).

Compiled Laws of Michigan, 1948, Section 117.3 (Mich. Stat. Anno., Section 5.2073).

Charter of the City of Detroit
Title VI, Chap. II, Sec. 1.
Title VI, Chap. IV, Sec. 1.
Title VI, Chap. IV, Sec. 7.
Title VI, Chap. IV, Sec. 26.
Title VI, Chap. IV, Sec. 27.

The provisions of the above cited statutes, regulations and ordinances are lengthy and accordingly their pertinent text is set forth in the Appendix attached hereto.

QUESTIONS PRESENTED

The questions presented for review are—

1. May appellants collaterally attack the authority for and validity of the inclusion of partial (progress) payment-title vesting provisions in procurement contracts or subcontracts, for defense materials for the

[2] As hereinbefore stated, we do not believe that the issues here involved are properly reviewable by appeal, but since the City of Detroit and County of Wayne in their brief refer to themselves as "appellants," rather than "petitioners," and to Murray as "appellee," rather than "respondent," for purposes of clarity only, we will use the designation of "appellant" and "appellee" herein.

United States, to which neither of appellants is a party?

2. Did the United States contract procurement officers have authority under Federal law to provide for and approve the inclusion of partial payment title vesting clauses, in subcontracts for the production of defense material?

3. Was the title vested in the United States, pursuant to the partial payment title vesting clause absolute and complete and not bare legal title or a lien for security?

4. Is property owned by the United States (otherwise immune from local taxation) subject to state and local **ad valorem** personal property taxation merely because the property is in possession of a private contractor and the tax is billed to the contractor and not directly to the United States?

STATEMENT OF CASE

Appellants' Statement of Case (pp. 9-21 of Appellants' Brief) is insufficient and does not present all of the cogent facts material to the issues before the Court. Accordingly, so that all of the facts pertinent to the issues before the District Court and the Court of Appeals are properly before this Court, Appellee submits the following Statement of Case. In the interest of intelligibility and continuity it is necessary to repeat some of the facts set forth in Appellants' Brief.

This is a consolidated action originally brought by plaintiff-appellee, The Murray Corporation of America (hereinafter referred to as "Murray"), for a refund of personal property **ad valorem** taxes assessed by defendants-appellants, City of Detroit and County of Wayne as of January 1, 1952 upon personal property of the United States then in the possession of Murray under two letter subcontracts, under letter prime contracts between Kaiser Manufacturing Company and the United States and Curtiss-Wright Corporation and the United States, respectively, for the manufacture of parts and components for aircraft and aircraft engines for the United States Air Force for defense purposes.

Title to such personal property was vested in the United States on and prior to the assessment date by virtue of provisions of partial-payment-title vesting clauses, incorporated in the letter subcontracts, hereinafter set forth, pages 12-15; 16-17.

The partial payment-title vesting clause in question is a standard and widely used clause in procurement contracts for defense work for the United States Government, which clause is permitted by Federal law and is provided for under applicable procurement regulations.

Representatives of the United States Air Force state that—

> "partial payment clauses with provisions vesting the title in the United States have been included in upwards of 80% of fixed price prime and subcontracts for the production of aircraft for the United States, by contract, and in substantially a greater percentage of contracts, dollarwise."

(Stipulation No. 2, Paragraph (2), (R. 86).

Partial payments were made to Murray under each of the aforementioned letter subcontracts prior to January 1, 1952, the assessment date, and thereupon title vested in the United States and remained vested in the United States on and after such date. Throughout, Murray contended that the property was owned by the United States and was immune from local ad valorem taxation and that the assessment and taxation of such property to Murray was illegal and void. After exhausting all administrative review Murray paid the taxes in question involuntarily and under written protest.

The cause was submitted to the District Court upon plaintiff-appellee's Motion for Summary Judgment and at the hearing of March 11, 1954—

> "it was **agreed** among the parties that **there was no genuine issue of any material fact**, and that a summary **judgment in favor of the plaintiff, or in favor of the defendants would be in order.**"

See opinion of District Court, 132 Fed. Supp. 899, 900 (R. 112).

The tax here in question is an **ad valorem property tax** assessed pursuant to the Michigan General Property Tax Law and the Charter of the City of Detroit.

The City of Detroit personal property taxes here involved were assessed pursuant to Title VI, Chapter II, Section 1 of the Charter of the City of Detroit which provides:

> "Section 1. **All** real and **personal property** within the city **subject to taxation by the laws of this state shall be assessed** at its true cash value by the board of assessors herein provided . . . **All taxes upon personal property** may be assessed in any district; **whether** the **person** assessed is **a resident of such district or not.**"

Both the City of Detroit and County of Wayne personal property tax assessments are made subject to the authority of the General Property Tax Act of Michigan, Act 206 of the Public Acts of Michigan, 1893, as amended (Mich. Stat. Anno. Sec. 7.1-7.243).

UNDISPUTED FACTS

(1) The assessment of $2,043,670[1] here in dispute was

---

[1] This consolidated action involves the recovery of $67,714.96 from the City of Detroit and $12,572.66 from the County of Wayne, exclusive of interest (R. 124-6). However, a number of similar cases, involving many millions of dollars, wherein state and local tax authorities are seeking to impose ad valorem property taxes upon defense material belonging to the United States under partial payment—title vesting clauses in the possession of appellee and other defense contractors, are presently pending in Michigan and in other jurisdictions.

As of April 30, 1957, it is estimated by the Air Materiel Command that the value of raw materials, work in process, parts, nondurable tools and inventories on which progress payments were made by Air Force totalled $2,846,704,900.

against property acquired or produced by appellee, Murray, under two letter subcontracts (a) one with Kaiser-Frazer Corporation (said corporation and its assignee, Kaiser Manufacturing Corporation, hereinafter referred to as "Kaiser") and (b) the other with Wright Aeronautical Corporation, now Curtiss-Wright Corporation (hereinafter referred to as "Wright"), each under and pursuant to letter prime contracts between the United States Government and Kaiser and Wright, respectively. (Stipulation No. 4, (10)) (R. 98).

(2) On December 20, 1950, Kaiser-Frazer Corporation entered into a letter prime contract, No. AF 33(038)-18481, with the United States Government for the manufacture of certain airplanes and airplane parts, tools and subassemblies for the use and benefit of the United States Air Force in furtherance of the national defense effort. This letter prime contract was thereafter assigned, with the consent of the Government, on June 18, 1951, to Kaiser Manufacturing Corporation, a wholly-owned subsidiary of Kaiser-Frazer Corporation. This letter prime contract and all amendments thereto (hereinafter referred to as the "Kaiser letter prime contract") in effect on January 1, 1952, the assessment date, are set forth as Exhibit 1 (R. 140-168) in the volume of appellee's exhibits referred to in the affidavit of Mark I. Sammon (R. 39-59), except for amendment No. 5, thereto, which is attached to the affidavit of M. H. Dreety (R. 91-93). A superseding definitive prime contract with Kaiser was not agreed upon in final definitive form nor made effective until May 16, 1952, after the assessment date (January 1, 1952) here in question (Stipulation No. 2 (9) (b)) (R. 89).

(3) (a) On March 23, 1951, Murray having been advised by Kaiser that Kaiser was a prime contractor of the United States Government to manufacture certain types of aircraft for the United States Air Force under said letter Prime Contract No. AF 33(038)-18481 (R. 140-168), entered into a

letter subcontract with Kaiser (R. 168-172) for the manufacture of certain parts and subassemblies, therein specified, which were required under said prime contract by and for the United States Air Force as a part of the current National Defense effort.

The aforesaid letter subcontract was amended by mutual agreement on August 15, 1951 (Exhibit 2B) (R. 173) and again on October 4, 1951 (Exhibit 2C) (R. 181).

(b) Murray expressly agreed in said letter subcontract with Kaiser (Exhibit 2A) (R. 169):

> "* * * to enter into a subcontract with you (Kaiser) **under** your **(Kaiser's)** Letter **Contract** AF 33(038)-18481 **with the United States Government** as amended by amendments Nos. 1 and 2 (copies of which have been submitted to us (Murray), covering your (Kaiser's) proposal * * *" (emphasis supplied)

and accordingly undertook to perform a portion of the work called for by the aforementioned Kaiser letter prime contract, and the Murray-Kaiser letter subcontract became a subcontract under said Kaiser letter prime contract with the United States Government.

(c) Said Kaiser letter prime contract (Exhibit 1, paragraph 5) (R. 145) expressly provided that—

> "Pending the execution of a definitive contract, each expenditure, order, **subcontract** or commitment made by you (Kaiser) in furtherance of your (Kaiser's) performance hereunder, if for an amount that shall exceed either five per centum of the amount last above stated or $25,000.00, whichever is less, for tools, dies, jigs, fixtures, materials, supplies, parts, equipment, engineering assistance of reproduction or other license rights **will be subject to written approval by the Contracting Officer. No contract,** regardless of the amount thereof, **shall be made by you** (Kaiser) with any other party for furnishing any

of the completed or substantially completed articles, spare parts or work herein called for, **without the written approval of the Contracting Officer** as to sources." (Emphasis furnished)

Both the aforesaid Murray-Kaiser letter subcontract and the amendments thereto were duly approved in writing on the signature pages thereof by a Contracting Officer of the United States Air Force as representative of the United States Government under and as required by the aforesaid letter Prime Contract AF 33(038)-18481 (Exhibit 1, Paragraph 5) (R. 145).

(d) Said letter subcontract, in the form of Exhibits 2A, B, C (R. 168-181), was in full force and effect on, prior and subsequent to January 1, 1952, the tax assessment date here in question (Stipulation 4, par. (4)) (R. 94). Under Paragraph 4 of the original Murray-Kaiser letter subcontract of March 23, 1951, (Exhibit 2A) (R. 170), provision was made for partial (or progress) payments to Murray as its work thereunder progressed, as follows:

> "It is understood that your (Kaiser's) Letter Contract with the Government (and the definitive contract to be executed pursuant thereto) will be amended so that there may be included in the Subcontract, and accordingly the subcontract will provide for, partial payments in substantially the same manner as provided in APR 5-407.2(1)[1] except that payments shall be 90% of cost instead of 75%.
>
> "We agree to furnish to you such information and to allow you to conduct such audits as may be required by

---

[1] Code of Federal Regulations, 1947 Supp., Title 10, Chapter VIII, 805.407-2; 12 Fed. Register page 7670 (R. 183). See Appendix B hereto.

The partial payment clause in the Murray-Kaiser subcontract, quoted on the next pages hereof, follows the language of the clause prescribed by the regulation.

the Government under the provisions of said Article in respect of requests for partial payments. You agree subject to the provisions of such Article to make partial payments to us. It is further understood that as soon as your Letter Contract is so amended, requests for partial payments may be made by us in respect of costs incurred by us hereunder."

Kaiser's letter Prime Contract was accordingly amended by Amendment 4 (Exhibit F) (R. 161), and thereupon Paragraph 11 was added to said original Murray-Kaiser letter subcontract by amendment dated August 15, 1951 (Exhibit 2-B) (R. 174), as follows:

Partial Payment Clause
Murray-Kaiser letter subcontract here in Question

"11. **Partial payments—Partial payments,** which are hereby defined as payments prior to delivery, **on work in progress for the Government** under this contract, may be made upon the following terms and conditions:

"(a) The **Contracting Officer may,** from time to time **authorize partial payments to The Murray Corporation of America** (hereinafter called "the contractor") upon property acquired or produced by it for the performance of this contract: Provided, that such partial payments shall not exceed 90 percent of the cost to the Contractor of the property upon which payment is made, which cost shall be determined from evidence submitted by the Contractor and which must be such as is satisfactory to the Contracting Officer; Provided further, that in no event shall the total of unliquidated partial payments (see (c) below) and of unliquidated partial payments, if any, made under this contract, exceed 80 percent of the contract price of supplies still to be delivered.

"(b) **Upon the making of any partial payment** under this contract, **title** to all parts, materials, inventories, work in process and non-durable tools theretofore acquired or produced by the Contractor for the performance of this

contract, and properly chargeable thereto under sound accounting practice, **shall forthwith vest in the Government;** and **title** to all like property thereafter acquired or produced by the Contractor for the performance of this contract and properly chargeable thereto as aforesaid **shall vest in the Government forthwith** upon said acquisition or production: Provided, that nothing herein shall deprive the Contractor of any further partial or final payments due or to become due hereunder; or relieve the Contractor, Kaiser-Frazer Corporation, or the Government of any of their respective rights or obligations under this contract.

"(c) In making payment for the supplies furnished hereunder, there shall be deducted from the contract price therefor a proportionate amount of the partial payments theretofore made to the Contractor, under the authority herein contained.

"(d) It is recognized that property (including, without limitation, completed supplies, spare parts, drawings, information, partially completed supplies, work in process, materials, fabricated parts and other things called for herein) title to which is or may hereafter become vested in the Government pursuant to this Article will from time to time be used by or put in the care, custody or possession of the Contractor in connection with the performance of this contract. The Contractor, either before or after receipt of notice of termination at the option of the Government, may acquire or dispose of property to which title is vested in the Government under this Article, upon terms approved by the Contracting Officer, provided, that, after receipt of notice of termination, any such property that is a part of termination inventory may be acquired or disposed of only in accordance with the provisions of the termination article of this contract and applicable laws and regulations. The agreed price (in case of acquisition by the contractor) or the proceeds received by the Contractor (in case of any other disposition), shall, to the extent that such price and proceeds do not exceed the unliquidated balance of partial payments hereunder, be paid or credited to the Government as the Contracting Officer

shall direct; and such unliquidated balance shall be reduced accordingly. Current production scrap may be sold by the Contractor without approval of the Contracting Officer but the proceeds will be applied as provided in this paragraph (d), provided that any such scrap which is a part of termination inventory may be sold only in accordance with the provisions of the termination article of this contract and applicable laws and regulations. Upon liquidation of all partial payments hereunder or upon completion of deliveries called for by this contract, title to all property (or the proceeds thereof) which has not been delivered to and accepted by the Government under this contract or which has not been incorporated in supplies delivered to and accepted by the Government under this contract and to which title has vested in the Government under this Article shall vest in the Contractor.

"(e) The article of this contract captioned "Liability for Government-furnished Property" and any other provision of this contract defining liability for Government-furnished property shall be inapplicable to property to which the Government shall have acquired title solely by virtue of the provisions of this Article. The provisions of this Article shall not relieve the Contractor from risk of loss or destruction of or damage to property to which title vests in the Government under the provisions hereof.

"(f) If this contract (as heretofore or hereafter supplemented or amended) contains provision for Advance Payments, and in addition if at the time any partial payment is to be made to the Contractor under the provisions of this partial payments article any unliquidated balance of advance payments is outstanding then notwithstanding any other provision of the Advance Payments Article of this contract the net amount, after appropriate deduction for liquidation of the advance payment, of such partial payment shall be deposited in the special bank account or accounts maintained as required by the provisions of the Advance Payments Article, and shall thereafter be withdrawn only pursuant to such provision."

(4) On December 12, 1950, Wright Aeronautical Corporation entered into a similar letter prime contract, No. AF 33(038)-18132, with the United States Government for the manufacture of certain airplane engines and engine parts and subassemblies for the ultimate use and benefit of the United States Air Force, in furtherance of the national defense effort. Wright Aeronautical Corporation was later merged into Curtiss-Wright Corporation, and Curtiss-Wright was substituted for Wright Aeronautical Corporation in the letter prime contract with the United States Government on October 31, 1951 (R. 211). This letter prime contract and all amendments thereto (hereinafter referred to as the "Wright letter prime contract") in effect on January 1, 1952, the assessment date, are set forth as Exhibit 4 (R. 189).

(5) (a) On April 19, 1951, Murray, having been advised by the Wright Aeronautical Corporation, now the Curtiss-Wright Corporation (hereinafter jointly or severally referred to as "Wright") that Wright was a prime contractor of the United States Government to manufacture certain types of aircraft engines for the United States Air Force under prime contract No. AF 33(038)-18132 (Exhibit 4) (R. 189), entered into a letter subcontract with Wright (R. 216) for the manufacture of certain engine parts and subassemblies, therein specified, which were required under said Prime Contract by and for the United States Air Force as a part of the current National Defense effort.

The aforesaid letter subcontract was amended by mutual agreement on May 24, 1951 (R. 222).

(b) Murray expressly agreed in said letter subcontract with Wright (Exhibit 5A) (R. 216):

"... to enter into a subcontract with you **under** your **(Wright's) contract** AF 33(038)-18132 **with the United**

> **States Government** pursuant to which subcontract we would manufacture and sell to you (Wright) the following subassemblies . . . "

and accordingly undertook to perform a portion of the work called for by the above Wright letter prime contract, and the Murray-Wright letter subcontract became a subcontract under said Wright letter prime contract with the United States Government.

(c) Both the aforesaid letter subcontract and the amendment thereto were duly approved in writing on the signature page thereof by a Contracting Officer of the United States Air Force, as representative of the United States Government as required by the aforesaid Wright letter prime contract No. AF 33(038)-18132 (Exhibit 4) (R. 192) in effect between the United States Government and Wright on January 1, 1952.

(d) Said Murray-Wright letter subcontract, in the form of Exhibit 5-A, B (R. 216-223) was in full force and effect on, prior and subsequent to January 1, 1952, the tax assessment date here in question (Stipulation 4, par. (2) (R. 94). Paragraph 5 of said letter subcontract (Ex. 5-A), (R. 219-220) provided for the making of partial (or progress) payments to Murray as the work covered by the subcontract progressed, as follows:

Murray-Wright Partial Payment Provision

> "It is understood that your contract with the Government will be amended forthwith so that there may be included in the subcontract, and accordingly the subcontract will provide for, partial payments of 75% of cost in substantially the same manner as provided in ASPR 5-

407.2(1).[5] We agree to furnish to you such information and to allow you to conduct such audits as may be required by the Government under the provisions of said Article in respect of requests for partial payments. You agree, subject to the provisions of such Article to make partial payments to us. It is further understood that as soon as your contract is so amended, requests for partial payments may be made by us in respect of costs incurred by us hereunder."

Murray was advised in the regular course of business that Prime Contract AF 33(038)-18132 (Exhibit 4) was amended on May 18, 1951 (See Exhibit 4, Amendment 4, par. 2-f) (R. 208), as agreed in the provision of said subcontract above quoted and the provision for partial payments to Murray by Wright thereupon became effective. (Affidavit of Mark I. Sammon (R. 47)).

(6) On August 10, 1951, September 21, 1951, October 24, 1951, December 10, 1951 and December 20, 1951, Murray forwarded formal written requests to Kaiser for partial (or progress) payments upon the sale price in the amounts of $23,293.13, $95,924.46, $44,821.61, $301,239.90 and $267,971.19, respectively (Exhibit 7) (R. 236-250), under and sub-

---

[5] The reference to ASPR5-407.2(1) was inadvertent. There was not then nor has there ever been an ASPR5-407.2(1), but said reference was intended by Murray, Wright and the United States Government to incorporate the partial payment provisions of APR5-407.2(1) (R. 183),—just as was done in the Murray subcontract with Kaiser (Paragraph 1, supra, Exhibit 2-A, Paragraph 4) (R. 170). All partial payments requested by Murray of Wright and paid by Wright to Murray after April 19, 1951, the date of the aforesaid letter contract (Exhibit 5-A, B), were made in accordance with APR5-407.2(1). APR5-407.2(1) appears in the Code of Federal Regulations, 1947 Supp., Title 10, Chapter VIII, Par. 805.407-2 (R. 183), which is in substantially the same form as the clause quoted in Paragraph 4 (d) hereof, which is Paragraph 11 of Murray's letter subcontract with Kaiser (Exhibit 2-B) (See affidavit of Mark I. Sammon (R. 47)).

ject to the provisions in its letter subcontract with Kaiser, hereinabove quoted (Paragraph (3) (d) hereof, supra, Exhibit 2-B, Paragraph 11) (R. 174).

Said requests for partial payments were made upon Form DOI 70-83 of the United States Air Force and pursuant to office instructions issued by Headquarters, Air Materiel Command, Wright-Patterson Air Force Base at Dayton, Ohio, which office instructions were delivered to Murray by the Contracting Officer of the United States Air Force who represented the United States Government in checking, approving and processing such invoices for partial (or progress) payments under Murray's aforesaid subcontracts with Kaiser and Wright (Exhibits 2-A, B, C (R. 169-183) and Exhibits 5-A, B (216-223)). Exhibit 6 (R. 224-236) consists of a copy of the aforesaid office instructions with Form DOI 70-83 attached, dated June 16, 1951.

The requests were duly audited by the United States Air Force Audit Staff for the Detroit area and approved in writing by a Contracting Officer of the United States Air Force representing the United States Government. Each such request bears upon its face the following endorsement duly signed and executed by a Contracting Officer of the United States Air Force.[6]

> "Under the provisions of the contract, I hereby authorize and approve a partial payment in the amount of $....." (R. 244).

The aforesaid audits and approvals of Murray's requests for partial (or progress) payments were pursuant to the requirements of the Air Force's Prime Contract with Kaiser (Exhibit 1, par 2b of Amendment No. 4 (R. 161-162). Ex-

---

[6] The requests of August 10, 1951 and September 21, 1951 were so approved by letters dated 20 September 1951 (R. 239) and 19 October 1951 (R. 242), respectively (Exhibit 7).

hibit 7 (R. 236-250) consists of copies of the aforesaid requests of Murray for partial (or progress) payments, bearing the Air Force Contracting Officer's approvals.

(All of the statements in 6 hereof appear in Sammon's affidavit, par. 3, (R. 47-49).)

(7) On October 30, 1951, and December 4, 1951, Murray forwarded formal written requests to Wright for partial (or progress) payments upon the sale price in the amounts of $371,420.38 and $139,407.29, respectively (Exhibit 8) (R. 251-255) under and subject to the provision in its letter subcontract with Wright, hereinabove quoted (par. 5(d) hereof, supra, Exhibit 5-A par. 5) (R. 219).

Said requests for partial payments were made upon Form DOI 70-83 of the United States Air Force and were duly audited by the United States Air Force Audit Staff for the Detroit area and approved in writing by a Contracting Officer of the United States Air Force, representing the United States Government, in the same manner as the Murray partial payment requests on Kaiser described in (6) hereinabove.

The aforesaid audits and approvals of Murray's requests for partial (or progress) payments were pursuant to the requirements of the Air Force's Prime Contract with Wright (Exhibit 4, Paragraph (f) of Amendment No. 4 (R. 208)). Exhibit 8 (R. 251-255) consists of copies of the aforesaid requests of Murray for partial (or progress) payments bearing the Air Force Contracting Officer's approvals.

(All of the statements in 9 hereof appear in affidavit of Mark I. Sammon, par. 4, (R. 49-50).)

(8) Pursuant to the aforesaid requests made by Murray to Kaiser, Murray received partial (or progress) payments in the aggregate amount of $163,949.20 on October 12, 1951.

Exhibit 10 (R. 258-259) consists of copies of the three Remittance Advices covering such payments kept by Murray, with the check number and date of receipt duly inscribed thereon in the regular course of business pursuant to Murray's regular, usual and ordinary system of record keeping and accounts.

(Affidavit of Mark I. Sammon, Paragraph 6, (R. 51).)

(9) Pursuant to the aforesaid requests made by Murray to Wright, Murray, on December 31, 1951, received a partial (or progress) payment in the amount of $510,827.67. Exhibit 11 (R. 259-261) is a copy of the Remittance Advice covering such payments kept by Murray, with the check number and date of receipt duly inscribed thereon in the regular course of business pursuant to Murray's regular, usual and ordinary system of record keeping and accounts.

(Affidavit of Mark I. Sammon, Paragraph 7, (R. 51).)

(10) The prime contractors, Wright and Kaiser, in turn promptly used the above amounts of partial payments made by them to Murray as a basis for their own respective requests for partial payments from the United States Air Force under their own letter prime contracts. Wright received partial payments from the government equal to 75% of the $510,827.67 it had paid Murray as partial payments and Kaiser received partial payments from the Government equal to 90% of the $163,949.20 it had paid Murray as partial payments.

(See affidavits of Nicholas Dykstra and E. R. Jones, with vouchers attached thereto as exhibits.) (R. 59-76)

(11) The United States Air Force representative (i) inspected goods produced by Murray under each subcontract at the Murray plant in Detroit, (ii) audited Murray cost

data and approved Murray's requests for partial payments, (iii) participated in Murray's negotiations with prime contractors on price redetermination and approved the same before they became effective after the prime contractor effected an agreement on redetermination with the government on the prime contract, (iv) approved any Murray authorization and payment of overtime, (v) reviewed Murray's accounting procedure and spot-checked its costs, and (vi) reviewed and proposed revisions to Murray's accounting procedure to conform with government requirements under Air Force supervision of the prime contracts. The foregoing was done to effect clearance for the prime contractors with the Air Force under the prime contracts, because the goods were produced by Murray for use under such prime contracts and constituted an element of cost thereunder (R. 86-7).

(12) The following was the situation on January 1, 1952, the assessment date—

(a) Tools already owned and furnished by the United States Government to plaintiff Murray under a separate facilities contract were not assessed and therefore are not involved in this dispute.

(b) Among the items plaintiff Murray was required to produce or acquire under the subcontracts here in question were certain tools.

(i) Such tools as had been completed by Murray under the subcontracts prior to January 1, 1952, were not assessed and are not a subject of this suit. Such completed tools remained in the possession of plaintiff Murray for its use in production of goods under the subcontracts in question.

(ii) Such tools which were in process and uncompleted prior to January 1, 1952, were included in the assessed property by the Assessors.

(c) No supplies or subassemblies (end products made by Murray) had been completed, inspected or delivered to either of the prime contractors by Murray under said letter subcontracts prior to January 1, 1952 and all such uncompleted property was subjected to the assessment here in dispute. (Stipulation No. 1, Paragraphs 3, 4 (a), (b), (c), and 5 (R. 82)).

(13) Included in the property assessed to Murray by the City of Detroit and County of Wayne on January 1, 1952, were parts, materials, inventories, work in process and non-durable tools which had been acquired or produced by Murray for the performance of its aforesaid letter subcontracts with Kaiser and Wright (Exhibits 2-A, B, C and 5-A, B) (R. 169-183).

(Affidavit of Mark I. Sammon, par. 12, (R. 56-57))

(14) Such assessed property was clearly identified on, prior and subsequent to January 1, 1952. This was done by tagging, labeling or by segregation, all according to such letter subcontract by number and description. This property was completely segregated from personal property owned and used by Murray in connection with the conduct of its regular business. Murray aircraft operations were all entirely separated from its automotive and other type operations (R. 97).

(15) None of the property in Murray's possession on assessment date (January 1, 1952)—which was the subject of the disputed assessment here—was acquired, produced or used by Murray for any purpose other than the performance of the Murray-Kaiser and the Murray-Wright subcontracts for components or parts for military aircraft or engines which Kaiser and Wright in letter prime contracts with the United States Air Force (Exhibits 1 and 4) had agreed to produce for the Federal Government in furtherance of the National Defense effort.

(Affidavit of Mark I. Sammon, par. 13, (R. 57-59))

(16) The policies of insurance held by Murray—contrary to the suggestion of Appellants in their brief, page 16,—took cognizance of the Government's ownership of certain property in Murray's possession, and covered the following:

> "All real and **personal property** of the insured, including manuscripts, mechanical drawings, tools, dies, jigs, and patterns, their own, or held by them in trust or on commission, or on consignment, or **sold but not delivered or removed,** or **for which they are liable,** all **while located** in and/or **on the premises** occupied by the insured." (Stipulation No. 1 (R. 83))

(17) Appellants state that "no change was made by appellee in its accounting procedure or methods pertaining to said personalty after receipt of a partial payment than were in effect before" (p. 17 of Appellants' Brief). This statement is taken from context and is incomplete. As stated in Stipulation No. 4, par. (7) (R. 96), Murray intended from the very beginning to have a partial payment clause in its contract and designed its accounting treatment **from the very beginning** as though it were operating under existing partial payment clauses.

(18) Appellants also state that "there was no different physical action or treatment in handling and dealing with the property in question after receipt of partial payments than before" (p. 18 of Appellants' Brief). Here again, the statement is taken from context and is incomplete. Murray did not change its action or treatment in handling the property acquired and produced under the aforementioned subcontracts because it was intended from the beginning that there be partial payment clauses in said subcontracts and Murray accordingly treated the property as Government-owned by tagging, labeling and segregating by contract number with code references to each contract (Stipulation No. 4, par. (8) (R. 97)).

(19) Murray has not billed nor been directly paid or reimbursed for the specific amount of 1952 personal property taxes paid under protest involved in this suit. It included an amount equal to the amount of such taxes paid by it as an element of burden in computing costs submitted for forward price determination and retrospectively as to goods completed and delivered prior to the date of the first price redeterminations. The redetermined prices involved a matter of negotiation and trading, give and take, on all cost items, of which this is one of many, and the price so determined in each instance was not that specifically requested by Murray (Stipulation No. 2, par. (3) (R. 87), Stipulation No. 4, par. (13) (R. 99) and Depesition of Mark I. Sammon, pp. 101-117). At all events, no price redetermination was made prior to the institution of the consolidated actions herein (Stipulation No. 2, par. 6 (R. 88)).

Murray made no assignment of its claim for refund of the 1952 personal property taxes paid by it, under protest, to anyone (Stipulation No. 4, par. (13) (R. 99)).

Under the Michigan statute pursuant to which Murray instituted this action for recovery of the taxes paid under protest, Murray is the only party permitted to maintain said action.

> "**The person paying** (any real or personal property tax) under such protest may, within 30 days and not afterwards, **sue** the township for the amount paid, **and recover,** if the tax or special assessment is shown to be illegal for the reason shown in such protest:***" (C.L. 48, Sec. 211.53, M.S.A. Sec. 7.97).

To the extent that recovery herein by Murray relates to an element of cost for which price redetermination was made, if ascertainable, Murray has advised Government officials that it intends to repay such amount, less the cost of litigation, to the United States Government (Stipulation No. 4, par. (13) (R. 99-100)).

SUMMARY OF ARGUMENT

This case is of national importance. It involves the power of local subdivisions of state governments to impose an ad valorem tax upon personal property in the possession of defense contractors, title to which is vested in the United States Government under standard and widely used partial payment clauses contained in procurement contracts for defense work for the Government, which clauses are permitted by law and are provided for under applicable procurement regulations.

The taxes here in question are **ad valorem propety taxes** assessed pursuant to the Michigan General Property Tax Law (206 of the Public Acts of Mich. 1893, as amended (6 Mich. Stat. Anno. Sec. 7.1-7.243)) and the Charter of the City of Detroit (Title VI, Chapter II, Section 1).

The tax is levied and assessed upon **property,** though collection may be enforced against the owner or, under certain circumstances, the person in possession. The tax is not a specific or privilege tax assessed against the taxpayer. *Detroit* v. *Phillip*, 313 Mich. 211; *Pingree* v. *Auditor General*, 120 Mich. 95, 102, 109.

If the title to and ownership of the property assessed was vested in the United States, the assessment is clearly void because such property owned by the United States is immune from taxation, even though in the possession of Murray. *United States* v. *Allegheny County*, 322 U.S. 174 (1944), *Van Brocklin* v. *Tennessee*, 117 U.S. 151 (1886); see *Kern-Limerick, Inc. and United States* v. *Arkansas*, 347 U.S. 110, 123, and footnote 14 therein; compare *Esso Standard Oil Co.* v. *Evans*, 345 U.S. 495 at 499 (1953).

On the other hand, if the partial payments clause was invalid under Federal Law or if the title under the partial payments clause was only a bare lien or security title—as Appellants contend—and ownership in fact remained in Murray on the tax assessment date, then under both Michigan and

Federal law the property was not immune from taxation and the assessment was valid. That is the basic issue presented by this case.

(i)

Appellants cannot collaterally attack the authority for and validity of the inclusion of partial (progress) payment-title vesting provisions in procurement contracts or subcontracts, for defense materials for the United States, to which neither of Appellants is a party.

American Smelting Co. v. *United States*, 259 U.S. 75; *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113; *Friend* v. *Lee*, 221 F. 2d 96 (1955).

(ii)

The Partial Payment Clauses Vesting Title in the Federal Government in the Murray Subcontracts were Authorized, Effective and Valid.

Appellants' contention that the Air Force procurement officers lacked authority to provide for the inclusion of partial payment clauses in the subcontracts here involved, transferring title to aircraft parts and components to the United States upon Murray's receipt of a partial payment upon the purchase price is contrary to express statutory provision, regulations and the decisions of the Court.

The subcontracts here involved and the prime contracts under which they were entered into were negotiated pursuant to authority contained in the Armed Services Procurement Act of 1947, 62 Stat. 23(a), Sec. 4a, (41 U.S.C.A. Section 151(c)), and regulations promulgated pursuant thereto. Following the enactment of the Armed Forces Procurement Act of 1947, the Secretaries of the respective departments of defense (Army, Navy and Air Force) promulgated and issued joint regulations commonly referred to as the "Armed Services Procurement Regulations," which regulations contained and authorized the specific partial payments clauses incorporated in the subcontracts here in question. Similar regulations were in force at the time the Act was enacted.

This very section of the Armed Services Procurement Act of 1947—Section 4a—was recently considered by this Court in *Keyn-Limerick*, supra, (1954), wherein it was held that Congress had granted wide discretion to the defense procurement agencies in determining the type of contract which would promote the best interests of the Government."

It has long been recognized that as an incident of the general right of sovereignty the United States may, within its Constitutional powers, through its various departments, enter into contracts which are not prohibited by law and are appropriate to the exercise of such powers (*Keyn-Limerick*, supra; *Van Brocklin* v. *Tennessee*, 117 U.S. 151, 154 (1886); *United States* v. *Linn*, 15 Pet. 290, 315 316 (1841); and like a private individual may enjoy unrestricted power to determine the terms and conditions upon which it will make needed purchases. *Heim* v. *McCall*, 239 U.S. 175 (1915); *Ellis* v. *United States*, 206 U.S. 246 (1907); *Atkin* v. *Kansas*, 191 U.S. 207 (1903).

Thus in the absence of prohibition procurement officers clearly have authority to include partial payment title vesting clauses in defense contracts. The inclusion of such provision is manifestly within and appropriate to the just exercise of powers granted to procurement officers by the Armed Services Procurement Act of 1947.

The fundamental error in Appellants' contention lies in their failure to recognize the clear distinction between "advance payments" and "partial payments" despite the fact that the Armed Services Procurement Regulations specifically distinguish between such payments. Partial **payments upon the purchase price**, in an amount less than costs expended, do not fall within statutory prohibitions relative to advance payments which are in the nature of a loan. The practice of using partial payment clauses in procurement contracts has been followed for over 70 years. The validity of such partial payment clauses with title vesting in the Government has been recognized and affirmatively approved by the courts, the Attorney General, the Comptroller General and the Armed

Services. *United States* v. *Ansonia Brass & Copper Co.*, 218 U.S. 452, 466-72 (1910); In re *Read York*, 152 F (2d) 313,316 (1945); 20 *Opinions of Atty. Gen.* (U.S.) 746, 747 (1894); 29 *Opinions of Atty. Gen.* 46, 48; *Comptroller Gen. Decision No.* B-83260, 4 Contract Cases Fed. (C.C.H.) Sec. 60,655 (1949); *Opinion of Judge Advocate Gen.*, SPJGC, (1945) 101118; 4 Contract Cases Fed. (C.C.H.) Sec. 60,916.

(iii)

Absolute Title and Beneficial Ownership of the Property in Question was Vested in the United States.

It has long been recognized that where Federal procurement contracts so provide, title to material on hand and goods in process, in the possession of a contractor, vests in the United States upon receipt by the contractor of a partial payment upon the purchase price. Such title in the United States is absolute and complete—not bare legal title for security purposes—and the property thus acquired is immune from state and local ad valorem taxes; *United States* v. *Ansonia Brass & Copper Co.*, supra; In re *Read York*, supra; *Douglas Aircraft Co.* v. *Byram County*, 57 Cal. App. (2d) 311 (1943); *Craig* v. *Liggalls*, 192 Miss. 254 (1942); *Superior Shipbuilding Co.* v. *Beckley*, 175 Wis. 337 (1921); *Wright Aeronautical Corp.* v. *Glander*, 151 Ohio 29 (1949).

The Partial payment clause clearly contemplates that the **Contractor** (Murray) shall **sell** and the **purchaser** shall **buy** and as partial payments are made **before completion** title to the goods and beneficial ownership thereof shall vest in the United States. *Ansonia*, supra. The subassemblies manufactured were made under Government specification, were Government inspected, for use in completed aircraft by the Air Force, to be fully and completely owned by the United States in every sense of the word ownership. The partial payments were not loans or advances to the Contractor, but were payments upon the purchase price (See Armed Service Procurement Regulations 1 CCH Gov't Contracts Rep. Paras 10,411). Title was not security title, since there was no debt to secure.

Title and beneficial ownership, in United States, as buyer, and immunity, such as obtains here as in *Ansonia*, is to be distinguished from a bare vendor's lien or security title in the United States, as Seller, where beneficial or equitable ownership is in a non-government buyer, *S.R.A. v. Minn.* 327 U.S. 558.

Appellants' contention that the contract provisions and the conduct of the parties, in dealing with the assessed property, were inconsistent with absolute title in the United States is without foundation. Virtually every argument advanced by Appellants in an attempt to support such contention was rejected by this Court in *Allegheny* and *Ansonia*, supra.

(iv)

Property Owned by the United States is immune from State and Local Ad Valorem Property Taxes even though it is in Possession of a Private Contractor.

Appellants' argument that the "incidence" of the tax is upon Murray because they assessed the property and sent the tax bill to Murray is without validity. The "incidence" of the ad valorem personal property tax here involved is upon the property and not upon the person to whom the tax bill is sent. *Detroit* v. *Gray*, 314 Mich. 516, 521, and *Pingree* v. *Auditor General*, supra. The power to tax is based upon jurisdiction over the property and not the person. *Detroit* v. *Phillips*, 313 Mich. 211; see *Allegheny*. This is unlike the privilege tax cases cited by Appellants where the incidence of the privilege taxes was upon the Contractor, exercising the privilege. Furthermore, renunciation of a lien on Government property hardly establishes that it is not being taxed, *Allegheny*, p. 187. This Court, in unequivocal language, held in *Allegheny* that Government owned property is immune from state and local ad valorem taxes either as against the Government or the person in possession of such property. See *Kern-Limerick*, 347 U.S. 110, 123.

Immunity of Government property may be waived only by Congress and therein lies Appellants' remedy, if any. *Allegheny*, supra, p. 177.

ARGUMENT

I.

May Appellants Collaterally Attack the Authority for and Validity of the Inclusion of Partial (Progress) Payment—Title Vesting Provisions in Procurement Contracts or Subcontracts, for Defense Materials for the United States, to Which Neither of Appellants is a Party?

The Court Below did not Decide this Question. Appellee Contends the Answer Should be "No."

Although the matter was presented and decided on the merits, the District Court observed that (R. 119):

> "there is some doubt concerning the propriety of a collateral attack by a city and a county upon the validity of a provision in a contract existing between parties to such contract when neither city nor county is itself party to said contract, and when the overall picture is as it is here."

The Court of Appeals did not comment on this issue.

The inclusion of the partial payment clauses in the Murray subcontracts was clearly authorized by the Armed Services Procurement Act of 1947 and regulations promulgated thereunder (see discussion, infra, pages 34-61). However, there appears to be compelling authority to support the proposition posed by the District Court that the appellants do not have the right to collaterally attack and challenge the validity of the title vesting clause in question.

In *American Smelting Co.* v. *United States*, 259 U.S. 75, it was argued that a contract with the Government for the purchase of copper was invalid since the agreement was not made by advertising in accordance with Federal statutory requirement. In an opinion rendered by Justice Holmes, this

Court ruled that such a defense was not available since the statutory requirements were solely for the benefit of the Government.

> "... It is argued that there was no valid contract since the agreement was not made by advertising and not within the exceptions ..." (page 78).

> "We may lay the the latter objection on one side ... Moreover **the statutory requirements were for the protection of the United States, not of the seller.** *United States v. N. Y. and Puerto Rico S.S. Co.*, 239 U. S. 88."

In *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 it was argued that the Secretary of Labor had exceeded his authority to establish certain minimum wage rates upon persons contracting with the Government under the Public Contracts Acts of June 30, 1936 (49 Stat. 2036) and prospective bidders sought to restrain Government purchasing officials from carrying out the Secretary's administrative wage determination. The Court ruled in unequivocal terms that statutory procedures for Government purchasing are for the sole benefit and protection of the Government, and those other than the Government have no standing to attack the terms and conditions upon which such purchases are made, stating:

> "Section 3709 of the Revised Statutes requires for the Government's benefit that its contracts be made after public advertising. **It was not enacted for the protection of sellers and confers no enforceable rights upon prospective bidders ... the duty is owing to the Government and to no one else"** (page 126).

> "In this legislation Congress did no more than instruct its agents who were selected and granted final authority **to fix the terms and conditions under which the Government will permit goods to be sold to it.** The Secretary of Labor is under a duty to observe those instructions just as a purchasing agent of a private corporation must observe those of his principal. In both instances

prospective bidders for contracts derive no enforceable rights against the agent for an erroneous interpretation of the principal's authorization. For erroneous construction of his instructions, given for the sole benefit of the principal, the agent is responsible to his principal alone because his misconstruction violates no duty he owes to any but his principal. The Secretary's responsibility is to superior executive and legislative authority. **Respondents have no standing in court to enforce that responsibility or to represent the public's interest in the Secretary's compliance with the Act.**" (p. 129).

This Court further pointed out that the acts of executive officers charged with purchasing needed goods and supplies for the Government are free from judicial interference or restraint—

> "Courts have never reviewed or supervised the administration of such an executive responsibility even where the executive duties 'require an interpretation of the law.' Judicial restraint of those who administer the Government's purchasing would constitute a break with settled judicial practice and a departure into fields hitherto wisely and happily apportioned by the genius of our polity to the administration of another branch of Government." (p. 128)

> "It is, as both Congress and the courts have always recognized, essential to the even and expeditious functioning of Government that the administration of the purchasing machinery be unhampered." (p. 130)

> "The interference of Courts with the performance of the ordinary duties of the executive departments of the Government, would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them." (p. 132)

In *Friend* v. *Lee*, 221 F. 2d 96 (1955) the Court ruled that statutes regulating contracting procedures of officers of the Federal Government are enacted solely for the benefit of the

Government and that third parties, who unsuccessfully sought the contract, can not attack contracts awarded by the contracting officers.

> "Plaintiff contends that the contract between the defendants and Avis is illegal on the ground that it was entered into without previous advertising for proposals as 41 U.S.C.A., Section 5 requires. But assuming *arguendo* that the statute is applicable and may have been violated, plaintiff, nevertheless, has no standing to sue to invalidate the contract. **Statutes regulating the contracting procedures of the Federal Government are enacted solely for the benefit of the Government** and confer no enforceable rights upon persons dealing with it. *Perkins* v. *Lukens Steel Co.*, 1940, 310 U.S. 113, 126. In consequence, **plaintiff cannot contest the award of the contract** to Avis, either **as a bidder** or in his capacity **as a citizen** generally." (page 100)

The appellants cannot collaterally attack the validity of the inclusion of partial payment clauses in procurement contracts. The statutory procedures with respect to payment for government purchases—which do not prohibit the inclusion of partial payment clauses in procurement contracts—are solely for the benefit and protection of the Government. As was stated in *In Re American Boiler Works*, 220 F. (2d) 819, at 321 (1955):

> **"In the absence of constitutional inhibitions the sovereign can make such contract as its pleases and no one can object."**

II.

Did the United States Contract Procurement Officers have Authority under Federal Law to Provide for and Approve the Inclusion of Partial Payment-Title Vesting Clauses, in Subcontracts for the Production of Defense Material?

The Lower Court answered "Yes."

Appellee contends the answer should be "Yes."

Under the Armed Services Procurement Act of 1947[1] the Air Force May Use Any Type of Contract and Include Any Type of Clause Therein—Not Prohibited by Law.

Congress expressly provided in Section 4(a) of the Armed Services Procurement Act of 1947, 62 Stat. 23(a) (41 U.S.C.A. Section 153(a) et seq.) that—

> "Except as provided in subsection (b)[2] of this section, contracts negotiated pursuant to Section 151(c) of this title may be of **any type** which in the opinion of the agency

[1] See Appendix A hereto—The Kaiser contract was entered into pursuant to Sec. 2(c) (1), (41 U.S.C.A. 151(c) (1); (R. 143). The reference in the Joint Appendix to Section 2(c) "(x)" is a printer's error and should read Section 2(c) "(1)" as per the Kaiser contract set forth in Plaintiff's Volume of Exhibits). The Wright contract was entered into pursuant to Section 2(c) (10), (41 U.S.C.A. 151(c) (10)) and was later amended under Section 2(c) (1), (41 U.S.C.A. 151(c) (1)), (191), of the Armed Services Procurement Act of 1947. Proper determinations, findings and delegations were made thereunder in respect to said contracts and the Murray letter subcontracts (Stipulation No. 3, (R. 90)).

[2] Subsection (b) excludes costs plus a percentage of costs type contracts, which are not here involved. It further provides for regulations governing cost-plus-a-fixed-fee contracts, which regulations do not prohibit partial payment clauses.

head will promote the best interests of the Government . . ."

This very section of the Armed Services Procurement Act—**Section 4(a)**—has been recently considered by this Court in *Kern-Limerick, Inc. and United States of America v. Scurlock, Commr. Rev. of Arkansas*, 347 U.S. 110, 116 (1954) wherein the Court held in plain and unequivocal language that—

> "The Government asserts that Sections 4(a) and (b) authorize this contract. Under them negotiated contracts, such as this, 'may be of **any type** which . . . will promote the best interests of the Government.' Under such a provision, it seems that the determination to use purchasing agents is permissible. **Where there is no prohibition *of a particular type of contract and no direction to use a particular type, the contracting officers are free to follow business practices.***"

citing *United States v. Linn*, 15 Pet. 290, 316; *Muschany v. United States*, 324 U.S. 49, 63.

Appellants contend that **"broad powers of negotiation to enter into any type of contract** did not by the same token include any type of clause" (Appellants' Brief, p. 57). Such contention is contrary to the clear statement and ruling in *Kern-Limerick*, which cited *United States v. Linn*, 15 Pet. 290, 316 (1841) wherein the Court specifically rejected the very same arguments which are here made by the Appellants, stating at page 316:

> "It is the duty of all public officers intrusted with the execution of powers delegated to them, to pursue the directions of the law conferring the power. But **to construe all such laws as a special delegation of authority, to be strictly and literally pursued; and to consider every departure from it, as done without authority, and absolutely void; would frequently be defeating the very object and purpose**

for which the law is made; and ought not to receive such a construction, unless the statute itself declares all such acts void."[10]

Section 4(a) of the Armed Services Procurement Act of 1947, (41 U.S.C.A. 153) follows the general rule, as supported by the above cases, that absent Constitutional prohibition or Congressional restriction, the Government, as an incident to the general right of sovereignty, may enter into any contract appropriate to the exercise of its powers (*United States* v. *Hodson*, 10 Wall 395; *Neilson* v. *Lagow*, 12 How 98; *United States* v. *Linn*, 15 Pet. 290; *United States* v. *Tingey*, 5 Pet. 115) and like a private individual may enjoy unrestricted power to determine the terms and conditions upon which it will make needed purchases. *Atkin* v. *Kansas*, 191 U.S. 207; *Ellis* v. *United States*, 206 U.S. 246; *Heim* v. *McCall*, 239 U.S. 175; *In re American Boiler Works*, 220 F 2(d) 319, 321; Cf. *Federal Trade Commission* v. *Raymond Co.*, 263 U.S. 565.

Thus, in the absence of a prohibition, express direction or authority to include partial payment-title vesting clauses in procurement contracts is not required. The inclusion of such provisions is within and appropriate to the exercise of powers granted to procurement officers by the Armed Services Procurement Act and regulations promulgated pursuant thereto. This is a complete answer to Appellants' contention (Appellants' Brief p. 32) regarding the requirement of ex-

---

[10]To like effect see *Van Brocklin* v. *Tennessee*, 117 U.S. 151, in which the Court said, at page 154:

> "The **United States,** for instance, as **incident to the general right of sovereignty,** have the **capacity,** within the sphere of their constitutional powers, and through the instrumentality of the proper department, to **enter into contracts** and take bonds, **not prohibited by law,** and **appropriate to the just exercise of those powers, although not expressly directed or authorized to do so by any legislative act . . .**"

press statutory "direction" to make such partial payments (see also discussion hereinafter at pages 52 to 56 and is not in conflict with any of the authorities cited by Appellants (Appellants' Brief pp. 46-47). There is here all the statutory authority and power required.[11]

Partial Payment Clauses Vesting Title in the Government in Procurement Contracts are not Prohibited by the Armed Services Procurement Act of 1947 or by any Other Law.

They Have a Long Historical Usage in Defense Procurement and are Presently Authorized and Used in 80% of the Air Force Procurement Contracts.

Nothing in the Armed Services Procurement Act of 1947, (41 U.S.C.A. 151 et seq.) or in any other law prohibits the inclusion of a standard partial payment clause in procurement contracts. Such partial payment clauses—vesting title in the Government—provide for the payment to the contractor or subcontractor of amounts less than the cost of goods acquired and work done under the contract up to the date of

---

[11]To carry out general authority granted to them by statute, department heads have the power to make appropriate regulations "not inconsistent with law." (See 5 U.S.C.A. 22, as well as 41 U.S.C.A. 156, Armed Services Procurement Act of 1947). This Court has not permitted such regulations to be lightly cast aside, as stated in *Boske* v. *Comingore*, 177 U.S. 459 at 470 (1900):

> "... a **regulation** adopted under section 161 of the Revised Statutes **should not be disregarded** or annulled **unless,** in the judgment of the court, **it is plainly and palpably inconsistent with law. Those who insist that such a regulation is invalid must make its invalidity so manifest that the court has no choice except to hold that the Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the act of Congress."**

To like effect, see *Maryland Casualty Co.* v. *United States*, 251 U.S. 342, 349; and *United States* v. *Morehead*, 243 U.S. 607, 613-14.

such payment (Exhibit 3) (R. 183). Partial or progress payment clauses of this nature have a long historical usage in procurement programs of the military departments of the United States Government, and are a basic and established method of procurement.[12] In fact, such clauses appear in more than 80% of the Air Force Procurement contracts and subcontracts, contractwise, and in a greater percentage, dollarwise (Stipulation No. 2, par. 2) (R. 86).

The legislative history of the Armed Services Procurement Act of 1947 clearly reflects the intention of Congress to empower defense procurement agencies to exercise the broadest powers of negotiation—not only to enter into contracts "of any type which in the opinion of the agency head will promote the best interests of the Government," but to enable them to work out "all terms" of such contracts which will benefit the Government. This clearly includes the power to provide for the inclusion of partial payment-title vesting clauses which have long been a basic part of procurement policy.

Appellants' erroneous interpretation of this legislative history does not support the proposition for which they contend, that while under Section 4(a) of the Act (41 U.S.C.A. 153)—

> ". . . contracts negotiated pursuant to section 151 (c) of this title may be of **any type** which in the opinion of the agency head will promote the best interests of the Government . . ."

---

[12]The practice of using partial payment clauses in procurement contracts, the fulfillment of which requires a long period of time and involves considerable sums of money, has been followed for over seventy years to the present day. The validity of such partial payment clauses with title vesting in the Federal Government was affirmatively approved by this Court in *U.S. v. Ansonia Brass & Copper Co.*, 218 U.S. 452, 466-72 (1910). To like effect see 20 Opinions of Attorney General (U.S.) 746, at 747 (1894), and a recent decision of the Comptroller General No. B-83260, (1949), 4 Contract Cases, Fed. (CCH) Sec. 60,655.

Congress was only considering **types** of contracts in a limited sense and intended to narrowly restrict procurement officers in the exercise of their duty in respect to the **form** and **provisions** of procurement contracts and that partial payments in negotiated contracts were not authorized and were **impliedly** prohibited (Appellants' Brief, pp. 37-40).

The bill was sponsored by the Acting Secretary of the Navy and the Secretary of War, and their views were shared by the Procurement Policy Board of the War Production Board composed of representatives of the various contracting agencies of the Government. W. John Kennedy, Acting Secretary of the Navy, wrote to the Speaker of the House of Representatives relative to the presentation of the Armed Services Procurement Act of 1947 and said, among other things,

> "**The primary purpose of the bill** is to permit the War and Navy Departments to award contracts by negotiation **when** the national defense or **sound business judgment dictates the use of negotiation** rather than the rigid limitations of formal advertising, bid and award procedures . . .
>
> "The Bill had its genesis in the Procurement Policy Board of the War Production Board, composed of representatives of the various contracting agencies of the Government. The subject of peacetime procurement methods was considered by this Board from time to time during 1944 and 1945, culminating in the appointment in the fall of 1945 of a special committee to recommend new legislation, **based upon the experiences of the agencies during the war years;** to take effect upon the expiration of the special war legislation. This **committee recommended** that legislation be enacted granting **authority to negotiate** prices and award **contracts, in** such **form** and **type as may be suitable,** at the discretion of the heads of the agencies.'"

(2 U. S. Code, Congressional Service, 80th Congress, Second Session, 1948, page 1075). Robert P. Patterson, Secretary of

War, in an almost identical letter (2 U. S. Code, Congressional Service, 80th Congress, Second Session, 1948, page 1077) concurred with the Acting Secretary of the Navy. Clearly, the sponsors of the Bill did not intend to narrowly limit procurement officers in respect to the form and provisions of negotiated procurement contracts.

In discussing Section 4(a) which empowers the Armed Services to use contracts of "any type which . . . will promote the best interests of the Government" and against which this Court in *Kern-Limerick* said **"there is no prohibition,"**[1] the Senate Report No. 571, (2 U. S. Code, Congressional Service, 80th Congress, Second Session, 1948, pages 1064 and 1065), among other things, states:

> "'The right to use the most suitable type of contract is an inseparable adjunct to the right to procure by negotiation . . . Negotiation permits the working out of **all terms**, not just price, and their harmonization in a way which will be most advantageous to the Government. Special provisions adapted to the circumstances of the particular purchase may be of material importance in securing the best possible agreement for the Government . . .'" (pages 1064-1065).

---

[1] Dissatisfied with the decision of this Court in *Kern-Limerick* v. *Scurlock*, Appellants (Appellants' Brief, page 41) make the following inordinate assumption:

> "Examination of the record and briefs filed in the Supreme Court in *Kern-Limerick* v. *Scurlock*, 347 U.S. 110, 98 L. Ed. 546, fails to disclose any reference to these Reports of the Committee Hearings to aid the Court. Appellants are inclined to the belief that had this Court had before it reports of said hearings, the majority opinion would have been otherwise in *Kern-Limerick*."

Reference is made by the Court to the Senate and House reports on the Act (see p. 114, footnote 4 of the Court's opinion).

While it was the intention of Congress to limit and define the instances where the Armed Services might make purchases and contracts by negotiation—as opposed to advertising—there was clearly no intent to limit or restrict the procurement officer's powers with respect to the terms and provisions to be included in such negotiated contracts. This is clearly illustrated by the excerpt from the committee hearings prior to the adoption of the Armed Services Procurement Act of 1947, (*House Armed Services Committee Hearings*, Vol. 38, Library of Congress, p. 576), quoted by Appellants at pages 40 and 41 of their brief:

"Mr. Brown: Section 4, subsection (a):

Except as provided in section (b) of this section 4, contracts negotiated pursuant to section 1 may be of any type which in the opinion of the agency head will promote the best interests of the Government.

Mr. Anderson: Without objection, subsection (a) of section 4 is approved as read.

Mr. Cole: What does that mean, that a contract may be of any type?

Mr. Hill: Prior to the war, the type of contract which was generally used was a lump-sum or fixed-price type of contract.

During the period of the war, it was discovered that other types of contractual arrangements could be contrived which conferred benefits on the Government. I have reference to cost-plus-fixed-fee contracts, cost-with-predetermined-overhead contracts, time-and-material contracts, so-called incentive-type contracts, and this is intended merely to state that **when you get into the field of negotiated contracts, the agencies are free to make that deal which they regard as the best deal from the standpoint of the Government.**"

At the time the Armed Services Procurement Act of 1947 was being considered, Congress was clearly aware of the prevailing policy and practice followed by the Air Force and other Defense Departments to provide by contract for the making of partial payments to defense contractors and for the vesting of title in the United States Government to the war materials being manufactured. That this is so appears from the records of the Subcommittee Hearings, H.R. 1366 (Armed Services Procurement Act of 1947) Document No. 51, dated Feb. 4, 1947, page 560. In connection with a discussion of Section 4(a) of the Act at these hearings, Col. Brannon (later Major General Brannon, Judge Advocate General of the Army) submitted and filed **"examples of some of the types of contracts which we use now and which we might anticipate using under this authority."** Among such examples of types of contracts was contract form No. 7, being a Letter Order for the manufacture of supplies, in which, among other things, there is a provision, No. 7, reading as follows:

> "(Par. 1307.7) 7. After your acceptance hereof, **partial and advance payments, in accordance with regulations**[1] from time to time applicable, may be made to you upon your application."

This directly negates the intimation (Appellants' Brief pp. 11-2) that partial payment-title vesting clauses did not appear in these exhibits before the Congressional Committee. (See pages 608-9 of the above record of Subcommittee hear-

[1] At that time in February, 1947, when Congress was considering the Armed Services Procurement Act of 1947, the following regulations were in effect, providing for partial payments and vesting of title in the Government as distinguished from advance payments, secured by lien: (40 Code of Federal Regulations, 1946 Supp. Pars. 803.330, 803.331 and 803.331(a)). Congress and the Armed Services, who proposed the bill to Congress, certainly were aware of the practice and regulations controlling. Congress did not limit or prohibit the use of such partial payment clauses in the Armed Services Procurement Act of 1947.

ings on H.R. 1366.) See form of Letter Contract No. 8 (pages 610-11) Par. 7, and War Contract Form No. 9 (pages 612-13) Par. 7, and War Contract Form No. 10 (pages 614-15), Par. 7, containing identical language to Par. 7 quoted immediately hereinabove on page 42.

Congress certainly was aware of the prevalent use of partial payment title vesting clauses in procurement contracts. The use of such clauses was not prohibited or restricted. That advance payments were different from partial payments was also recognized. (See discussion hereinafter at pages 49 to 52, and also language in the above-quoted paragraph 7.)

Appellants' contention that the Armed Services Procurement Act did not permit contracting officers to use partial payment title-vesting clauses in procurement contracts is unsupported and without merit.

Contrary to the Contention of Appellants, 31 U.S.C.A. 529 (formerly R.S. 3648) does not prohibit the use of partial payment-title vesting provisions in Air Force Procurement Contracts.

31 U.S.C.A., 529 provides that:

> "No advance of public money shall be made in any case **unless authorized by the appropriation concerned or other law.** And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment . . ."

The statute is in the identical form it has always been since 1823 (3 U.S. Statutes at Large, Chap. IX, p. 723), except for the bold-faced words which were added to the statute on August 2, 1946, by Amendment H.R. 4586 (which subsequently became H.R. 6533, Section 11 of which Bill amended 31 U.S.C.A. 529).

This statute, prior to the 1946 amendment, was construed long ago as not prohibiting partial payments which did not exceed the value of services performed or work done, as the work progressed, if **"the United States became the owner of the work paid for."** 20 Opinions of Atty. Gen. (U.S.) 746 at 747 (1894).[15]

In their brief filed in the District Court, Counsel for the City did not contend that 31 U.S.C.A. 529 prohibited the making of partial payments prior to the 1946 amendment. However, they contended that the 1946 amendment effected "a most significant change" (City Brief filed in District Court pp. 31 and 32) and served to prohibit the making of partial payments in connection with procurement contracts. As we pointed out in the District Court (Murray Reply Brief pp. 9-14), this contention is utterly fallacious and entirely without basis. The 1946 amendment was very limited in purpose and effect, as shown by the legislative history.[16] It

[15] See also 1 Comp. General 143 (1921) relating to partial payments in aircraft procurement contracts.

[16] **"Section 11. Advances of Public Funds.**—The advance of public money generally is prohibited by section 3648, Rev. Stats. (31 U.S.C. 529). **Occasionally,** to meet special needs and particular situations (especially in the case of transactions abroad) it has been found necessary to create legislative exceptions to the general rule. These situations are **comparatively minor** but are apt to require quick legislative action. Section 11 would amend the original section cited **merely** by adding the words 'unless authorized by the appropriation concerned or other law.' Its purpose is **merely** to sanction the incorporation of exceptions in the appropriation acts as may be required from time to time without raising the question of a point of order."

(p. 7 of Senate Report 1636).

To like effect see House Report No. 2186, 79th Congress, Second Session and report of hearing, February 13, 1946, before the Committee on Expenditures in the Executive Department, House of Representatives, 79th Congress, Second Session, H. R. 4586 (which subsequently became H. R. 6533, Section 11 of which Bill amended 31 U.S.C.A., Section 529).

was not directed toward preventing the inclusion of partial payment clauses in Government contracts in amounts not in excess of the value of goods acquired and work theretofore performed, with title vesting in the Government, which for years prior and subsequent[17] thereto have been held not to be within the prohibition of the statute. This legislation was enacted merely "to cut down on Government red tape." The 1946 amendment to 31 U.S.C.A. 529 did not make a "most significant change" in said statute as it previously existed.

Payments to a contractor or subcontractor—where the amounts of such payments are not in excess of the services theretofore rendered on the goods in process—whether (a) under a partial payment clause vesting title and ownership in the Government or (b) under any nomenclature and secured by lien or otherwise, are not in violation of 31 U.S.C.A. 529. As the Attorney General of the United States said in 29 Opinions of Atty. Gen. 46, at 48:

> "The general rule would therefore seem to be well recognized that, in the absence of statutory prohibition, **partial payments may be made** on account of work done in the construction of vessels for the Navy **if** (1) **title** to the vessel **shall have passed to the United States at the time of such payments,** or (2) a lien shall have been created by law or contract upon the unfinished vessel to the amount of such partial payments."

[17] In Comptroller General's Decision No. B-83260, 4 Contract Cases Fed. (C.C.H.) Sec. 60,655 (1949) it was held that a modification of a contract providing for the inclusion of a partial payment clause for partial payments not exceeding the value of work done and goods acquired with title thereto and "all future improvements" vesting in the Government was not in violation of or prohibited by 31 U.S.C.A. 529, as amended. See also Opinion of Judge Advocate General, SPJGC, 1945/101118, Nov. 2, 1945, 4 Bull. J.A.G.A. 474, 4 Contract Cases Fed. (C.C.H.) Sec. 60,016.

Only where payments exceed the value of the work performed prior thereto were such payments prohibited. Section 5 of the Armed Services Procurement Act, 41 U.S.C.A. Sec. 154, was required only to authorize payments in excess of the value of work performed.

It is to be noted that 31 U.S.C.A. 529 permits of payment only to the extent of "the value of the service rendered, or of the articles delivered, previously to such payment"—and not (a) in advance of any work being performed or goods being acquired under the contract or (b) to an extent greater than the cost of such services performed or goods acquired prior to such payment. Therefore, to enable procurement officials to make advance payments in connection with military procurement, required a relaxation of the limitation above noted, which Congress authorized in Section 5 of the Armed Services Procurement Act of 1947, 41 U.S.C.A. Sec. 154. Section 154 specifically provides for such advance payments—in contradistinction to partial payments such as are here involved—under certain conditions which require specific determinations by the Agency Head[18] that such payments (i) are in the public interest or in the interest of national defense (ii) are necessary and appropriate in order to procure required supplies and may include a security provision, including a lien in favor of the Government paramount to all other liens upon the supplies contracted for, upon the credit balance in any special account in which such payments may be deposited and upon such material and other property acquired for performance of the contract. Thus, the suggestion that 31 U.S.C.A. 529, as amended in 1946, requires an express and specific statutory "direction" by appropriation or other law to make the partial payments

[18]This determination, unlike many other important determinations, may not be delegated to others by the Agency Head. See 41 U.S.C.A. Sec. 156(b).

in question and that such direction and limitation is found in 41 U.S.C.A. 154 (Appellants' Brief, page 38) is fallacious. Express authorization by the appropriation concerned or other law is required for "advance payments" of the character prohibited by 31 U.S.C.A. 529. However, partial payments with title vesting in the Government, such as are here in question—where the payments are not in excess of the value of work theretofore performed or goods theretofore acquired and the amount of the payment has actually been earned by the contractor and the United States has received an equivalent in value therefor—are not and have never been within the prohibition of the Act.

No such authority was required for partial payments less than the value of work performed prior thereto.

Nothing in this section of the Armed Services Procurement Act of 1947, 41 U.S.C.A., Sec. 154, prohibits partial or progress payments to an extent less than the value of services performed and goods acquired prior thereto, if the United States Government is vested with the title thereto and becomes the owner thereof. Thus, contrary to the argument of Appellants, the standard and long-used partial payment clauses here in question are not prohibited.

The Procurement Regulations in force at the time the Murray contracts were entered into authorized standard partial payment clauses.

Following the enactment of the Armed Services Procurement Act of 1947, the Secretaries of the respective departments of defense (Army, Navy and Air Force) promulgated and issued joint regulations for the armed forces commonly referred to as the "Armed Services Procurement Regulations" 32 Code of Fed. Regulations, 1949 Edition (1950 Pocket Supplement), Part 400-428, pages 28-210.

Said Armed Services Procurement Regulations became effective May 19, 1948 (32 Code of Federal Regulations, Sec. 400.103, 1949 Edition (1950 Pocket Supp.)) and specifically provided (Sec. 400.102) that:

"Rules, **regulations,** and directives of any Department or Departments **not in conflict with this subchapter,** as from time to time amended, **shall remain in full force and effect.** This subchapter is not intended to cover detailed procurement procedures or instructions of the respective Departments and their procuring activities, all of which procedures and instructions may be prescribed as provided in Sections 400.106 and 400.107."

At that time there was an army procurement regulation in effect, which also pertained to procurement by the Department of the Air Force (Title 10, Code of Federal Regulations, 1947 Supp. Chap. VIII, 801.100; 12 Fed. Register, page 7670, November 18, 1947) which army procurement regulation specifically provided for partial payments—less than the value of services performed and goods theretofore acquired—as work progressed, with title vesting in the United States immediately thereupon to all goods theretofore and subsequently acquired. This provision of the regulation is commonly known as APR 5-407.2 (Title 10, Code of Fed. Regulations, 1947 Supp., Chap. VIII, Sec. 805.407-2; 12 Fed. Register, page 7693, Nov. 18, 1947, Exhibit 3 (R. 183) and see Appendix B hereto). The regulation also contained the language of a specific partial payment clause and this specific clause was incorporated in the Murray-Kaiser letter subcontract as Paragraph 11 thereof (See Exhibit 2B[19] (R. 174-177); see also reference thereto in original letter subcontract between

[19]The reference in the first portion of the Kaiser-Murray letter subcontract of March 23, 1951, Exhibit 2-A, (R. 170), is to APR 5-407.2(1), but in the Amendment of August 15, 1951, (R. 174), which incorporates the clause verbatim, the reference thereto is to JPR 5-407.2(1), which reference is the same as the previous APR reference, except that Army Procurement Regulations became known as the Joint Procurement Regulations after the Air Force was transferred procurement responsibilities pursuant to the National Security Act of 1947 (Joint Army and Air Force Procurement Circular No. 1, 15 January, 1948).

Murray and Kaiser dated March 23, 1951, Exhibit 2A, par. 4 (R. 170). This same clause was also incorporated by reference in the Murray-Wright subcontract, Exhibit 5A, par. 5,[29] (R. 219).

Contrary to Appellants' statement (Appellants' Brief, page 46), Appellee does not base its position with regard to the validity of the partial payment title vesting provisions here involved upon Procurement Regulations alone. The regulations authorizing the use of partial payment clauses were made pursuant to and in consonance with the authority of the Armed Services Procurement Act of 1947. Appellants' attempt to delimit the authority granted by the Armed Services Procurement Act of 1947 fails to find support in the Act itself, the legislative history or the regulations issued pursuant thereto and is contrary to the controlling pronouncement of this Court in *Kern-Limerick*.

The Regulations expressly recognize and point out the difference between Partial Payments on Account as the work progresses and Advance Payments made in advance of any work or in excess of the value of work theretofore performed.

The Armed Services Procurement Regulations also contained specific regulations relating to advance payments—as distinguished from partial and progress payments—32 Code of Federal Regulations, 1949 Ed., 1950 Pocket Supp., Chapter IV, Sub-part E, Sections 402.500-402.505. As pointed out hereinabove, these advance payments, as authorized by the Armed Services Procurement Act of 1947 (41 U.S.C.A. 154), are for advance payments before any work is performed or materials are acquired, or in excess of the value of work performed or materials acquired. Section 402.501 specifically

[29]See Affidavit of Mark I. Sammon, par. 2 (R. 47), re ASPR 5-407.2, which appears under Statement of Facts, supra, page 17, footnote 5.

distinguishes between advance and partial payments as follows:

> **"Nature of advance payments.** Advance payments shall be deemed to be payments made by the Government to a contractor in the form of loans or advances prior to and in anticipation of complete performance under a contract. **Advance payments are to be distinguished from 'partial payments' and 'progress payments' and other payments made because of performance or part performance of a contract."**

It will further be noted from Sections 402.502-402.505 that unlike partial payment provisions for payments less than the value of services theretofore preformed or goods theretofore acquired or produced; the provisions for advance payments require compliance with those sections of the Armed Services Procurement Act of 1947 (41 U.S.C.A. 154) which specifically require (i) security, (ii) that the agency head himself determine that advance payments are necessary to procure supplies, and (iii) security provisions, with payments being placed in a segregated bank account subject to withdrawal only upon authorization of the contracting officer, together (iv) with provisions for a lien in favor of the Government.

No such provisions appear in connection with partial payment clauses where title and ownership vests in the Government.

The Department of the Air Force issued additional procurement procedures to implement the Armed Services Procurement Regulations (32 Federal Code of Regulations 1949 Ed. 1950 Pocket Supp. Section 1000.101, effective October 1, 1950) referred to hereinabove, and specifically recognized the existence of partial payment provisions in Procurement Contracts and noted the differences between such payments and advance payments. 32 Code of Federal Regulations 1949 Ed. 1950, Pocket Supp. Chapter VII, Subpart E, Section 1002.501-1002.505; Section 1002.501 specifically provides:

"Sec. 1002.501. Financing of Government Contracts for supplies and services—(a) Policy. The policy of the Air Force is to require contractors furnishing supplies or services to be able to perform the contract with their own funds or with private financial assistance. **In negotiated procurements, Government assistance may be granted contractors** by providing for expeditious reimbursements to contractors for proper expenditures under cost and cost reimbursement type contracts and **by the use of partial payments** in connection with fixed price contracts. The benefits of Government assistance to the contractor should be reflected in the negotiations of any particular procurement.

"(b) **Exceptions. Exceptions to the above policy may be made** in such instances in negotiated procurements **where the contractor** is particularly adapted in the supplying of the items or services to be procured but **whose capital is limited and where commercial or private financing is unobtainable. In such cases,** consideration will be given to the use of Government financing **by way of advance payments** under such terms and conditions as the Under Secretary of the Air Force may prescribe."

Appellants' reference to "Advance-Partial Payments" (Appellants' Brief, p. 46, et seq.) in an effort to construe partial payments and advance payments as being alike ignores controlling regulations in force at the time the contracts were entered into, the language of the statutes regulating advance payments—as distinguished from partial payments—and the basic differences between the partial payments and advance payments.

As stated above, advance payments are payments made in advance of any work being performed or goods being acquired or in an amount greater than the cost of such services performed or goods theretofore acquired. Partial payments, such as are here involved, where title vests in the Government and the payments are not in excess of the value of work

theretofore performed or goods acquired are entirely different from advance payments.

Contrary to Appellants' contention, neither 31 U.S.C.A. 529, as amended, nor any other Act of Congress indicates the necessity of express statutory "direction" for the use of partial payment-title vesting clauses in Procurement Contracts.

As has been pointed out immediately hereinabove, there is nothing in 31 U.S.C.A. 529, as amended in 1946 or prior thereto, which either prohibited or required express and specific statutory "direction" for the inclusion of title vesting-partial payment clauses in procurement contracts.

This Court in the *Kern-Limerick* case, supra, clearly holds that contracting officers are free to enter into such types of contracts in such form and with such clauses as good business practice warrants. Under *United States* v. *Linn*, supra, cited by the Court in *Kern-Limerick* the Court held and in *Van Brocklin* v. *Tennessee*, (See ante, pages 35 to 37) the Court said that—such governmental officers may

"enter into contracts . . . not prohibited by law . . . appropriate to the just exercise of those powers, although not expressly directed or authorized to do so by any legislative act."

The inclusion of title vesting-partial payment clauses in procurement contracts by contracting officers is not prohibited and falls within the scope of power and authority vested in them under the Armed Services Procurement Act of 1947.

Notwithstanding, Appellants (Appellants' Brief, pages 33-37) refer to certain other legislation relating to the use of partial payments as work progresses, and seem to infer therefrom that in order to permit the use of partial payments here, specific Congressional direction is necessary. The legis-

lative history of the laws to which counsel refer clearly negates such an inference.

For example, reference is made by Appellants (Appellants' Brief, page 33) to 34 U.S.C.A., Section 582, dealing with partial payments in Navy contracts **with provision for a lien in favor** of the Government paramount to all other liens. The legislative history of that law, adopted in 1911, clearly demonstrates that it was not enacted in order to enable the Secretary of the Navy to make partial payments—because the making of such partial payments without express statutory direction; where title vested in the Federal Government, had long been recognized as not prohibited by Section 3648 of the Revised Statutes (31 U.S.C.A. 529). It will be noted that the Attorney-General expressly recognized the validity of partial payments with title vesting in the Government.[21] However, where the Navy followed the practice of contracting for a lien to secure partial payments, he expressed some question as to whether courts would sustain such liens as paramount and superior to liens created under state laws. Therefore, the Committee report stated—

> "In view of the opinion of the Attorney-General set forth above, that in the absence of such legislation it is impossible to state what the courts will hold owing to the difficulty arising **with respect to the creation of a lien** . . . the Committee deems the legislation necessary."

(Report No. 39, 62nd. Congress, First Session, House of Representatives, May 26, 1911, to accompany H.R. 9442).

The Act of October 6, 1917 (40 Stat. 383) referred to by Appellants (Appellants' Brief, page 33) does not relate to

---

[21] 29 Op. Atty. Gen. (U.S.) 46, 48 (See page 45 supra). This opinion was considered by the Congressional Committee and was incorporated in full in the Committee Report No. 39 referred to above.

partial payments. It relates to advance payments in excess of the value of services performed or goods acquired, which payments, as pointed out above, are entirely different from partial payments and are not here involved.

Title 50, U.S.C.A. 1151, referring to partial payments, expressly specifies that such payments by the Navy shall "be subject to a lien as provided by the Act of August 22, 1911" (37 Stat. 32; 34 U.S.C. 582). Therefore, it may fairly be said that since the purpose of statutory authorization in 34 U.S.C.A. 582 was to make certain that the lien to be given to the Government would be paramount, the same purpose obtained in connection with 50 U.S.C.A. 1151. The law was not necessary to authorize partial payments where absolute title vested in the Government, which have always been recognized as not prohibited by 31 U.S.C.A. 529, but was enacted to insure the status of the lien as paramount.

The reference to 50 U.S.C.A. 611 (Appellants' Brief, page 34) is no authority for the proposition that explicit statutory direction is necessary to make partial payments which are not in excess of the value of services performed and work done prior thereto and not prohibited by 31 U.S.C.A. 529—which is the situation in the case at bar **where title is vested in the United States Government.** Section 611 is a very broad statute empowering the President to authorize any department or agency exercising functions in connection with national defense to enter into contracts and amendments thereto and "to make advance, progress and other payments thereon, **without regard to the provisions of law** relating to the making, performance, amendment, or modification of the contract whenever he deems such action would facilitate the prosecution of the war . . ." The effect of this statute in part is to permit advance payments notwithstanding the general prohibition of 31 U.S.C.A. Section 529, and to permit progress (or partial) payments even under circumstances in which they might otherwise violate 31 U.S.C.A. 529—that is, with-

out title-vesting or lien and in excess of the value of work done or goods acquired. Progress (partial) payments are not prohibited by Section 529 when the Government obtains title to property the value of which is at least equal to the amount of such payments. This is supported by the very language of 31 U.S.C.A. Section 529, by opinions of United States Attorneys General and by Congressional Reports. Both Senate Report 911 and House Report 1507 (77th Cong., 1st Session) concerning the bill which became Section 611, contained an appendix in which the following statement was made:

> "III Provisions Concerning Advance and Partial Payments.
>
> "A. 31 U.S.C., Sec. 529 is a general prohibition against paying for any Government purchase before delivery or **before title is taken to it."**

Progress (partial) payments may, however, conflict with Section 529 **when the Government does not obtain title.** Section 611 eliminates the possible conflict in the latter situation. The fact that Section 611 has the effect of authorizing certain progress (partial) payments otherwise prohibited cannot be the basis for an inference that **all** progress (partial) payments would be prohibited in the absence of Section 611.

41 U.S.C.A. 154 of the Armed Services Procurement Act of 1947 (Appellants' Brief, page 34) lends no support to the proposition that express Congressional direction must be obtained in order to permit partial payments where title vests in the Government and the payments are not in excess of the value of work theretofore performed or goods theretofore acquired. Section 154 deals with advance payments which may be (a) in advance of any work being performed or goods being acquired, or (b) in an amount greater than the cost of such services performed or goods theretofore acquired. Therefore, 41 U.S.C.A. 154 was enacted to confer authority theretofore limited by 31 U.S.C. 529 (see page 46,

supra.). The same may be said about 41 U.S.C. 255, referred to by Appellants (Appellants' Brief, page 36).

Appellants argue that "nowhere in any of the preceding statutes . . . do we find any statutory provision authorizing vesting of title . . . The statutes provide for a paramount lien only . . ." (Appellants' Brief, page 36). The above legislative history, as appears from the various Congressional Reports, clearly indicates that Congress has always recognized that no express direction or authority was necessary for the making of partial payments in an amount not in excess of services performed or the value of goods theretofore acquired where title vested in the United States Government and that such payments are not prohibited under 31 U.S.C.A. 529. Wherever partial payments are mentioned in legislation in connection with liens, the law does not restrict the Defense Department to a lien and prohibit the Government from taking title. However, where a lien is taken such laws were enacted to make certain that such lien should be "paramount to all other liens." No specific legislation is required for the Government to take absolute title to goods being manufactured for it where it has made a partial payment on account of the purchase price. (See pages 43 to 47, supra.)

Contracting Officers have Authority to use Partial Payment Clauses in Procurement Contracts.

As pointed out hereinabove, there is nothing in the Armed Services Procurement Act or regulations which requires a specific finding on the part of the Secretary in connection with partial payments as contrasted with the requirements for advance payments. Consequently, there is authority in the Contracting Officer through the delegation to him of procurement responsibilities to use the partial payments clause where he deems it necessary in carrying out his procurement responsibilities, and there are no prohibitions against delegating to the Contracting Officer authority so to do. How-

ever, there are prohibitions against such delegation in the case of advance payments.[22a]

General authority of an Armed Services Department Secretary or Agency Head to delegate to others, procurement responsibilities — not otherwise prohibited — is specifically provided for in the Armed Services Procurement Act of 1947, Section 10 (41 U.S.C.A. Section 156):

> "The determinations and decisions provided in this chapter to be made by the agency head may be made with respect to individual purchases and contracts or with respect to classes of purchases or contracts and shall be final. Except as provided in subsection (b) of this section, the agency head is authorized to delegate his powers provided by this chapter, including the making of such determinations and decisions in his discretion and subject to his direction, to any other officer or officers or officials of the agency."

See also Section 7 relating to determinations and delegations. Also see 32 Code of Federal Regulations 1949 Ed. 1950 Pocket Supp. Section 100.402 regarding general authority of Contracting Officers, and also Section 1000.400 which sets forth procurement responsibility of the Commanding General, Air Materiel Command, and authorizes delegation of procurement authority and the appointment of Contracting Officers.

The parties expressly stipulated and agreed, (Stipulation 3) (R. 90), that the letter prime contracts and the letter subcontracts and the definitive contracts, thereafter executed by the United States Air Force and Wright, Kaiser and Murray respectively, (a) were negotiated by Contracting Officers of the Air Force who were duly appointed as such and that

---

[22a] "The power of the agency head to make the determinations or decisions specified in . . . Section 154(a) of this title shall not be delegable . . ." (41 U.S.C.A. 156(b)).

appropriate authority so to do had been delegated to them in accordance with the Armed Services Procurement Act of 1947 and regulations promulgated thereunder, and (b) such determinations and findings as were required by said statute or regulations thereunder were made at or prior to the time of execution of such contract. However, appellants reserved the right to question whether the terms of such contracts, including the partial payment clause, could lawfully be incorporated therein.

From the foregoing there can be no valid basis for any conclusion, other than that—

(1) partial payments clauses of the character in question may be used, and are not prohibited under the provisions of the Armed Services Procurement Act of 1947;[23]

(2) partial payments clauses are specifically authorized by the regulations and procedures of the Departments of Defense and Air Force; and

(3) such partial payment clauses are not prohibited by any other law.

---

[23]Appellants concede that no "express prohibition against partial payments appears in the Armed Services Procurement Act of 1947" (Appellants' Brief, p. 32). Contrary to Appellants' contention, there is likewise no provision in the Armed Services Procurement Act of 1947 or any other law which implies that partial payments are prohibited. Had Congress intended to prohibit or restrict the long-standing use of partial payment clauses in procurement contracts it would have expressly done so in the Armed Services Procurement Act of 1947. As stated in *Robertson* v. *Labor Board*, 268 U.S. 613, 627, "it is not lightly to be assumed that Congress intended to depart from a long-established policy."

Contracting Officers May Approve and Authorize the Inclusion of Partial Payment Clauses in Subcontracts.

Contracting officers who have the authority to negotiate procurement contracts of "any type" and with any provisions not prohibited by law or regulation, clearly have the power to limit the extent, terms and source of subcontracting by prime contractors and to prescribe on what terms and conditions—not prohibited by law or regulation—such subcontracts shall be made. No contention made by Appellants warrants any contrary conclusion.

Likewise, the suggestion that the provision vesting title in the United States Government under the partial payment clause in the subcontract is ineffective because there is no privity of contract with the Government is a non sequitar and is equally unsupportable.

It is elementary that parties who are not in privity of contract, nevertheless, may be vested with valuable property interests and enforceable rights thereunder. Williston on Contracts, Revised Edition, Vol. 2; Sec. 347.

This rule is particularly applicable here, where defense materials are being made for the United States Government for use in the exercise of its sovereign power, according to its special and classified specifications, under a prime contract which permits of subcontracts, only if approved by the Government and upon terms satisfactory to it. The Government—though not in strict privity of contract—is no stranger to this transaction.

An essential adjunct to the power to negotiate and control prime contracts is the right to **approve** and where necessary to protect the interests of the Government to **supervise** sub-

contracts. This is recognized by the Letter Contracts[24] entered into between the Government and the prime contractors wherein it is provided that all subcontracts, in furtherance of performance of the prime contracts, which exceed 5% of the prime contract, or $25,000, whichever is less, "will be subject to the written approval of the Contracting Officer". (Kaiser prime contract, par. 5 (145) and Wright prime contract, par 5. (192)).

The products produced by the prime contractor and the subcontractors will culminate in one end product for the Government for defense purposes. It is therefore necessary and proper that the Government through the Air Force Contracting Officers have the right to approve, supervise and control not only the prime contractor but the subcontractors as well.

With the required approval of the contracting officer, the parties, following long-established procurement procedure, included in their respective contracts a partial payments clause with a provision for vesting of title in the Government. Partial payments from the prime contractor to Murray, the subcontractor, are reimbursed to the prime contractor by the Government.[25] No statute, regulation or judicial decision precludes the making of such a subcontract with title vesting directly in the Government to goods made for the requirement and ulti-

---

[24]In each of the subcontracts and each of the amendments thereto it was expressly provided that said **subcontracts and amendments thereto were entered into and "approved under the provisions of such prime contract."** (See Exhibit 2A, (169 and 172); Exhibit 2B, (173, 178 and 179); Exhibit 2C, (183); Exhibit 5A, (216 and 221); Exhibit 5B, (223)).

[25]See Air Materiel Command, Directorate Office Instruction No. 70-83 (Procurement and Industrial Planning) Paragraph 4 (e). Exhibit No. 6, (226).

mate use of the Government, even though the Government is not in strict privity of contract with or directly liable to the subcontractor.[26]

---

[26]That Congress recognized the validity of such a title vesting clause under a subcontract is further indicated by reference to 40 U.S.C.A. 472 (k), which is a Surplus Property Disposal Act enacted in June of 1949 and amended in September, 1950, prior to the date of the Murray subcontracts in question, which section provides, among other things—

> "(k) The term 'contractor inventory' means (1) **any property acquired by and in the possession of** a contractor or **subcontractor under a contract pursuant to the terms of which title is vested in the Government . . .**"

III.

Was the Title Vested in the United States Pursuant to the Partial Payment-Title Vesting Clause absolute and complete and not Bare Legal Title or a Lien for Security?

The Lower Court Answered "Yes."

Appellee Contends the Answer Should be "Yes."

In respect to the partial payment clause here in question counsel for Appellants City of Detroit and County of Wayne contend that:

(a) "Appellee retained all of the incidents of ownership in the property, while the Government received only a security or paper title for financing advanced to appellee." (Appellants' Brief, page 53).

(b) "The legal title theory is the creation of Government lawyers, blandly over-reaching their procurement powers as limited by Congress;" (Appellants' Brief, page 36)

(c) "Attempts to explain the actions of the procurement officers lead to just one conclusion: that partial payment provisions were an afterthought and an over-reaching on their part." (Appellants' Brief, page 43)

(d) "'A lawyer's ingenuity devised a technically elegant arrangement'*** (the partial payment-title vesting clause) which did not change the true nature of the transaction." (Appellants' Brief, page 75)

(e) "The traditional immunity of the Federal Government and its property should be distinguished from attempts to create immunity[27] by ingenious contract words having no substantial relation to the protection of the sovereign from hostile action of the States but devised mostly for the Government's or a contractor's specific economic benefit." (Appellants' Brief, page 26)

The partial payment-title vesting clause is hardly an "after thought" or "the creation of Government lawyers, blandly over-reaching their procurement powers." The partial payment-title vesting clause, such as here in question, is a standard, long-established (for over seventy years) and widely used clause in United States Government procurement contracts (See 18 Opinions Atty. Gen. (U.S.) 105 (1885)). This

---

[27]The suggestion of Appellants that the partial payment-title vesting clauses are "attempts to create immunity by ingenious contract words" is directly contrary to their express stipulation that—

"In the negotiation of the respective prime contracts between the United States Air Force, Kaiser and Wright, the negotiating parties did not consider the possible avoidance of City and County ad valorem and personal property taxes as an element in their decision as to whether or not the standard partial payment clause (referred to in procurement regulations) should be inserted in these contracts." Stipulation No. 2, Par. (1) (R. 86).

Even if avoidance of ultimate payment of State or local tax was the purpose, it is not here determinative. *Kern-Limerick*, 347 U. S. 110, 116.

Court and other Courts, with but a single exception,[28] have held that these partial payment-title vesting clauses effectively vested title and beneficial ownership to the material, and work in process in the United States Government—as distinguished from mere security or lien title—and that the property so owned was immune from State ad valorem taxation or liens created by State law.

United States v. *Ansonia Brass and Copper Co.*, 218 U.S. 452, 466-472 (1910)

In *re Read-York, Inc.*, 152 F (2d), 313, 316-7 (1945)

Douglas Aircraft Co. v. *Byram County Tax Collector*, 57 Cal. App. (2d) 311; 134 Pac. (2d) 15 (1943)

Craig, State Tax Collector v. *Ingalls Ship Building Corp.*, 192 Miss. 254, 5 So. (2d) 676

Superior Shipbuilding Co. v. *Beckley*, 175 Wis. 337, 185 NW 199

See *Wright Aeronautical Corp.* v. *Glander*, 151 Ohio 29, 84 NE (2d) 483 (1949)

See *Kern-Limerick, Inc.*, supra, and *U.S.* v. *Allegheny County, supra*

See also, In re *American Boiler Works*, 220 F (2d) 319, 321 (1955)

---

[28]The only exception is *American Motors Corp* v. *City of Kenosha*, 274 Wis. 315, 80 NW (2d) 363, discussed at p. 74, infra, which fails to even mention or discuss *Superior Shipbuilding Co.* v. *Beckley*, 175 Wis. 337, 185 NW 199, supra, which is directly contrary to its holding in American Motors.

United States v. *Lennox Metal Manufacturing Co.*, 225 F. (2d) 302, cited by Appellant, does not stand for the proposition asserted by Appellant but merely holds that where the Government terminates a contract for an alleged default on the part of the contractor, and such alleged default is caused by the Government's wrongful and arbitrary refusal to make partial payments as agreed, a Court of equity will not permit the wrongdoer to benefit by his own wrong and to capture goods in process upon such wrongful termination. The decision does not turn upon the issue of whether or not a partial payment-title vesting clause creates absolute title or merely a security or lien title. Cf. *United States* v. *Ansonia Brass & Copper Co.*, 218 U. S. 452; *In re Read-York*, 152 F(2d) 313, and other partial payment clause cases cited hereinabove.

The decision of this Court in *United States* v. *Ansonia Brass and Copper Company*, 218 U.S. 452 (1910) is the primary and controlling authority for virtually all of the above cases.

In the *Ansonia* case this Court in unequivocal language stated the cardinal rule relative to the construction and judicial determination of the effect of contracts containing partial payment-title vesting clauses such as here involved, saying—

> " . . . it is well settled that if the **contract** is such as to **clearly express the intention of the parties that the builder shall sell and the purchaser shall buy** the ship **before its completion,** and at the different stages of its **progress,** and this purpose is expressed in the words of the contract, it is **binding** and **effectual** in law to **pass the title."** *U. S.* v. *Ansonia Brass & Copper Co.*, 218 U.S. 452, 467.

So, too, in the case at bar, the parties to the contract—to which Appellants were not parties—clearly and unmistakably expressed their intention that title should vest in the United States and,

> "that the builder shall **sell** and the purchaser shall **buy** . . . **before its completion** and at different **stages of its progress** . . ."

The partial payment clauses in each of the subcontracts in the case at bar express the intention of the parties that upon receipt by Murray of—

> "partial payments . . . prior to delivery, on **work in progress for the Government** under this contract . . .
>
> (b) . . . **title** to all parts, material, inventories, work in process and non-durable tools theretofore acquired or produced by the Contractor for the performance of this contract, and properly chargeable thereto under sound accounting practice, **shall forthwith vest in the Government;** and **title** to all like property thereafter acquired or produced by the Contractor for the performance of this contract and properly chargeable thereto as aforesaid **shall vest in the Government forthwith** upon said acquisition or production . . ."

The express language certainly carries no suggestion of an intention by the parties to pass anything less than absolute and beneficial ownership to the United States.

As the District Court said (R. 121):

> "A type of contract whose ultimate purpose is specification manufacturing for a purchaser under which title is to pass before delivery, but after partial payment, appears to this Court to be a far cry from any customary lien or security situation . . . .
>
> "It was intended by the parties that plaintiff was to manufacture certain sub-assemblies according to specification which would become the property of the purchaser, United States. The fact of future delivery is not determinative of ownership. The fact of contractual agreement is—such agreement stipulating the time for passage of title. Why should plain, unambiguous language be distorted so as to convert a legal title holder to a lien or because persons not party to the contract contend that title passed prematurely?"

In the instant case Murray had contracted with certain Government prime contractors—with the required approval of the Government—to manufacture aircraft subassemblies to be paid for by the Government, for use by the Air Force of the United States and to be fully and completely owned by it in every sense of the word ownership.

Partial payments were payments on account of the purchase price. The contractor received such payments for work done. The amount so received was not a loan or debt which contractor was obliged to repay. There was no debt—no obligation—title was not security title, since there was no obligation to secure. Compare advance payments, which are loans, where interest is paid and security and lien are required to secure such obligation.

Appellants, in support of their erroneous contention that the Government did not acquire absolute title to the property here involved, attempt to construe partial (progress) pay-

ments as mere advancements. However, this attempt is negated by the Armed Services Procurement Regulations upon which Appellants purportedly rely. These regulations specifically distinguished partial payments from advancements.

> **"Advance payments are** considered as **loans** to the contractor prior to and in anticipation of complete performance of a contract. **Advance payments are thus distinguished from 'partial payments' and** 'progress payments' **made because of performance or partial performance of a** contract." 1 *CCH Gov't Contracts Rep.*, Para. 10,411.

See discussion supra, pages 49-52.

The claim that the partial payments made to Murray were in the nature of a loan giving rise to a lien is patently erroneous.

The *Ansonia* case carefully and clearly distinguished between procurement contracts which provided for the vesting of title in the Federal Government under partial payment provisions, and those which merely gave the Federal Government a lien. In that case this Court had before it both types of clauses. In connection with the contract for the construction of the vessel "Bonyuard" wherein partial payments with vesting of title was provided it was held that **title** and ownership vested in the United States absolutely free from seizure or encumbrance by the laws of a state sovereign, as distinguished from the rule to the contrary in case of the vessels "Mohawk" and "Galveston" where the procurement contract only provided for a **lien.**

In enacting the Armed Services Procurement Act of 1947 Congress was aware of the difference between advance payments with lien provisions, the use of which was expressly limited, and provisions for partial payments as the work progressed with title and absolute ownership vesting in the Government, which had long been in use and which were not by such Act limited or prohibited. The procurement branches of the **Air Force knew the legal effect of and difference** between

title vesting partial payment clauses such as those here in question, and provisions for **lien** under advance payment provisions.

None of the elements of a mortgage or mere security transaction is here present. The Government intended to acquire absolute ownership and beneficial use of the defense materials manufactured by Murray. It is plain that title was not taken by the Government to secure the performance of any obligation by Murray.

Under The Title Vesting Provision of the Partial Payment Clause the Federal Government can maintain Control of Defense Material in Process until Delivery, so Essential to its Governmental Functioning—which Does not Obtain if it Merely has a Lien for Security.

It is of the utmost importance to the defense agencies of the United States Government, who are charged with the duty of preparing adequate military aircraft and implements of war for purposes of National Defense, that the Government at all times—even during the process of manufacture—have complete and absolute control and ownership of essential, basic and critical war material. This is one of the reasons why the title vesting provisions in partial payment clauses appear in eighty per cent (80%) of the Procurement Contracts of the United States Air Force.[29]

---

[29]Compare *S.R.A., Inc.* v. *Minnesota*, 327 U.S. 558, where the Federal Government as seller of real estate retained only a vendor's lien but had and retained no beneficial interest or "sovereignty in the United States" (pp. 563-4). *S.R.A.* and *Hines Lumber Co.*, 248 P (2d) 720, primarily relied upon by Appellants are inapposite for this reason, among others. Absolute title and beneficial ownership are in the Federal Government under the standard form of partial payment-title vesting clauses in the case at bar. As is pointed out, infra, page 98, the City and County cannot destroy the constitutional immunity of this government-owned property, by attempting to assess it to Murray on the basis (nowhere provided by State law)—That the tax is "subject to prior rights of the Federal government."

Appellants can now hardly be heard to the contrary in view of their express stipulation that—

> "The actual factors which the parties considered in arriving at a determination to include such partial payment clauses were the needs of the contractor for partial payments as the work progressed in view of the period of time involved in the performance of each contract, together with the desire of the Air Force to maintain control of material and work in process during the life of the contract, so that such material could be moved elsewhere in the event of nonperformance." Stipulation No. 2, Par. (1) (R. 86)

It is most important that absolute ownership and control be vested in the Government during all stages of manufacture.

> "The language of the article is designed to protect the rights of the government. After all, this is a contract made by an agency charged with the national defense and it is quite understandable that prompt and decisive action is required when a contractor is unable to carry out his agreements." *In re American Boiler Works*, 220 F (2d) 319, 321.

It is important to the Government that it have such ownership and control so that it can divert raw material or work in process to another Defense Contractor where the supply of such material is short, so as to expedite fulfillment of an overall Procurement Program, as was done in the instant case in a few isolated instances at the direction of the Government (See Stipulation 4, par. (10) (R. 98)).

It is important that the Government have the ownership and control of such material if there be a strike at the plant of the contractor or subcontractor and the materials must be moved elsewhere, or the contractor or subcontractor becomes involved in financial difficulties and his goods are otherwise subject to attack of creditors, or subject to labor liens (see *In re Read-York*, and *In re American Boiler Works*, supra).

The aircraft parts in question are for defense purposes and are specially designed under specifications many of which are

secret. Therefore, the Government does not wish to have such materials in process subject to the use of the contractor or subcontractor for his own purposes or subject to attack, sale and use by his creditors.

> "We are now treating of property which the United States owns. **Such property,** for the most obvious reasons of public policy, **cannot be seized by** authority of **another sovereignty** against the consent of the Government. The **Benyuard,** as fast as constructed, **became one of the instrumentalities of the Government, intended for public use,** and could not be seized under state laws . . ." *U. S.* v. *Ansonia Brass* 218 U.S. 452, 471.

> "It would be intolerable to imagine that the United States would not have the right at all times and under all circumstances to the possession of such materials 'purchased *** to promote the defense of the United States.'" *In re American Boiler Works*, 123 Fed. Supp. 352, 354.

None of these safeguards can be assured to the United States or obtained if the title-vesting clause is deemed only to be one of lien or security title. Clearly it was intended by the Government that full and complete ownership of the materials in question be fully reposed in it.

Government ownership of property acquired by virtue of partial payments upon the purchase price is not denied or affected by regulations as to control of Government property.

Appellants contend that the Government did not consider itself as "really owning" the property here in question (Appellants' Brief, page 75), and attempt to misconstrue the regulation entitled "Manual for Control of Government Property" (1A *CCH Gov't Contracts Rep.*, Para. 29,754) in support of such contention.

The regulation referred to is limited in its application and scope and states that **"as used in this manual"** (Para. 29,754) property title to which is vested in the Government as a result of partial payments **"shall not for purposes of this section** be

classified as Government property" (Para. 29,754) (104.2). This is not a denial of Government ownership of property upon which partial payments have been made but rather is a definition for administrative purposes of different classes of Government-owned property. Said regulation was accordingly expressly limited to a particular classification so that it would not have general application for all purposes.

Paragraph 205.5 of said Manual for Control of Government Property (1A *CCH Gov't Contracts Rep.*, Para. 29,757), which is not quoted in Appellants' Brief, refutes any contention that the provisions of said Manual were intended to or could operate to deny the Government's ownership of property acquired by the making of partial payments upon the purchase price.

> "Advance, **progress** or **partial payments**—pursuant to the terms of a contract **the Government may acquire title** to property upon the making of advance, **progress or partial payments** to the contractor. **Property** to which the **Government has acquired** a lien or **title** solely **as a result of partial,** advance or progress **payments shall not be subject to the provisions of this manual."**

The property covered by this Manual is machinery, durable machine tools and other such property which by its character is not consumed in the manufacture of the final end product in the course of performance of the contract, as are materials and supplies used in the process of manufacture covered by the partial payment-title vesting clauses. This type of property may be furnished by the Government[30] under a Facilities Contract or may in some instances be acquired by the contractor. Property of this character does not lose its original form and character in the performance of the contract and may be used

[30] Accordingly, the prime and subcontract provisions referred to by Appellants (Appellants' Brief, page 74) dealing with "Liability for **Government-furnished** Property" are expressly made inapplicable to property to which the Government shall have acquired title by virtue of partial payments on the purchase price.

time and time again in the performance of other contracts. Thus it is a simple matter for the Government to control said property without reliance upon the contractor's records. As to inventory and supplies used in manufacture, control by the Government at each stage of the manufacturing process is impracticable and, therefore, the Government looks to the contractor for accountability and risk until the product is manufactured.

Clearly, by its express language, the aforementioned Manual for Control of Government Property has no application to the instant case and does not purport to deny the Government's absolute ownership of property acquired by virtue of making partial payments upon the purchase price. The express and unequivocal language of the title vesting provision of the Murray subcontracts is not affected by the aforementioned regulation.

The foregoing also explains why risk of loss during process of manufacture was by agreement placed upon the manufacturer and why it carried insurance.

None of the contract provisions or procurement regulations are inconsistent with the vesting of legal and beneficial ownership in the United States Government.

Risk of Loss and Insurance

Appellants' contention (Appellants' Brief, pages 58-61) that because the parties contracted that Murray should bear the risk of loss to the Government-owned property Murray should thus be regarded as the owner thereof is a non-sequitur. It is not uncommon for a seller to assume the risk of property in his possession even though title thereto has passed to the buyer. When the seller assumes the risk of loss of property, title to which has passed to the buyer, "he thereby virtually becomes an insurer of goods which he does not own" (Williston on Sales, Sec. 302, Rev. Ed.). Accordingly, it was incumbent upon Murray to protect itself against possible loss by insuring the property of the Government in its possession.

The policies of insurance held by Murray took cognizance of the Government's ownership of certain property in Murray's possession; and covered the following:

> "All real and **personal property** of the insured, including manuscripts, mechanical drawings, tools, dies, jigs, and patterns, their own, or held by them in trust or on commission, or on consignment, **or sold but not delivered or removed, or for which they are liable,** all while located in and/or on the premises occupied by ~~the insured~~." (Stipulation No. 1(83))

Appellants' statement that—

> " * * * if destruction of the property caused appellee not to perform its obligation, the Government would not be entitled to reimbursement for the value of the property destroyed but merely to recover its money paid out in the form of partial payments." (page 59)

is patently incorrect and contrary to the express terms of the contract clause upon which they attempt to found their argument.

The subcontract here involved states:

> " * * * The provisions of this Article shall not relieve the Contractor from risk of loss or destruction of or damage **to property to which title vests in the Government** under the provisions hereof." (R. 177)

There is no statement or intendment that Murray's liability to the Government would be limited to the partial payments received by Murray in the event of loss or destruction of the property. The parties recognized that the property was owned by the Government and Murray was responsible for such property. If the property had been destroyed Murray would be obligated to pay to the Government the **total value of the property** less any unpaid portion of the sales price owing to it by the Government.

An insurable interest in property does not require or imply any property interest or beneficial ownership in the property. It is sufficient that the insured be so situated with reference to

the property that he would be liable to pecuniary loss should the property be destroyed (29 Am. Jur., p. 294, Sec. 322. See also 29 Am. Jur., p. 296, Sec. 325).

The statement of the Wisconsin Supreme Court in *American Motors Corp.* v. *City of Kenosha*, 274 Wis. 315, 80 N.W. (2d) 363 to the effect that who assumes the risk of loss must be construed as possessing an "element of ownership,"[31] relied upon by Appellants, is not in accord with the law of sales, property or insurance and is contrary to the clear expressed intent of the parties. It may be observed that the Wisconsin Court in *American Motors* did not discuss or even refer to its previous decision to the contrary in *Superior Shipbuilding Co.* v. *Beckley*, 175 Wis. 337 (1921), 185 N.W. 199, supra where it held, relying upon the *Ansonia* case, that vessels and

---

[31] In *American Motors* the Court recognized that the question as to whether or not title was vested in the United States Government pursuant to the partial payment-title vesting clause was a question of Federal law and conceded that title was vested in the United States. The Court, however, sought to escape the admitted controlling authority of *Allegheny* by saying that "title and ownership are two different things" and "the question of ownership for tax purposes is one of local law." Such reasoning is contrary to *U. S.* v. *Allegheny County*, 322 U. S. 174, *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110, and *Society for Savings in the City of Cleveland* v. *Tax Commr. of Ohio*, 349 U.S. 143. Federal immunity naturally is dependent upon Government ownership and this question is one of Federal law not controlled by the law of any state.

The Wisconsin Supreme Court, 80 NW (2d) 363, at 367, states that it was "not satisfied" that the United States Court of Appeals in the case at bar (The *Murray* case) considered provisions of the contract which bear upon ownership as contrasted with mere security or lien title. A reading of the opinion of the United States Court of Appeals (R. 271) citing *Ansonia*, distinguishing *S.R.A.* and a checking of the briefs of the parties filed in the Court below (wherein the contract provisions and the other arguments now presented and discussed in the Wisconsin opinion, were discussed at length) irrefutably negates the suggestion of the Wisconsin Court. Furthermore, it is significant that the Wisconsin Court completely overlooked or failed to meet the controlling decision in *Ansonia* dealing with title and ownership as contrasted with mere lien or security title.

materials therefor in the process of construction for the United States were immune from state taxation because title had passed to the Government pursuant to a partial payment-title vesting clause. The Court there held that—

> "The fact that the contract contained other clauses relating to insurance, the duty of the Company to restore the property in case of destruction by fire and the payment of valid taxes, if any, **does not operate to modify the clear intent of the parties as expressed in the language of the contract** relating to the time when title shall pass." (185 N.W. 199, 201)

The fact that Murray contracted to accept responsibility for loss or destruction of Government-owned property in its possession and sought to protect itself against possible pecuniary loss through the use of insurance does negate the express intent of the parties that title—and beneficial ownership—should pass to the purchaser and ultimate user, the United States Government upon receipt of a partial payment upon the purchase price as the work progresses.

Authority to acquire or dispose of property "at option of Government" and "upon terms approved by the Contracting Officer."

Appellants' argument (Appellants' Brief, page 61) that because the subcontracts here involved permitted Murray to acquire or dispose of Government property in its custody and possession, upon certain conditions, Murray was the beneficial owner thereof is erroneous. The language of the contract states that—

> "The Contractor, either before or after receipt of notice of termination **at the option of the Government,** may acquire or dispose of property **title to which is vested in the Government** under the Article, **upon terms approved by the Contracting Officer."** (Exhibit No. 2B, par. 11 (d) (R. 176))

The above clause recognizes the ownership of the Government and permits the contractor to acquire or dispose of the property only "at the option of the Government" and then

only "upon terms approved by the Contracting Officer." In addition, the agreed price or proceeds for any acquisition or disposition of such property by the Contractor must be paid or credited to the Government as directed by the Contracting Officer (Exhibit No. 28, par. 11 (d) (R.176)).

The extensive control exercised by the Government over the property acquired or produced under the contracts here involved is more than a mere "supervision of the bookkeeping" of Murray.[32] (Appellants' Brief, page 62). The Wisconsin Court and Appellants' contention in this respect ignores the self-evident purpose of the partial payment title vesting clause and the importance of Government control over vital defense materials.

The United States Air Force was interested in procuring aircraft and component parts therefor for the national defense and to that end entered into prime contracts with Kaiser and Wright (Exhibit No. 1 (R. 140-168) and Exhibit No. 4 (R. 189-215)) for the manufacture of such aircraft, reserving the right to control the terms and extent of subcontracts entered into by the prime contractors. The sole aim and purpose of the United States Air Force was to acquire aircraft and to control the production thereof and materials incident thereto at all times.

Disposal of Scrap

Contrary to Appellants' claim (Appellants' Brief p. 63) the fact that Murray, by contract, was empowered to sell current production scrap without approval of the Contracting

---

[32]While the Government did take certain steps to check Murray's costs See Stipulation No. 2, par. 4(a), (b), (c) and (d) (R. 86), to effect a clearance for the prime contractor, there is no basis for the contention that the Government was primarily engaged in the banking or loan business rather than the maintenance of the national defense and the control of the materials and property essential thereto.

Officer, provided that the proceeds therefrom were paid or credited to the United States Government, is certainly not inconsistent with the vesting of title and beneficial ownership in the United States.

Upon receipt of partial payment, title to all material and work in process was vested in the United States. When scrap was generated in the course of current production, Murray did not thereupon become the owner of such scrap. When Murray sold the scrap (for convenience of handling) at the site of the manufacturing operation, the proceeds (of this Government property) were "paid or credited to the Government as the Contracting Officer shall direct"—which is consistent with Government ownership. Otherwise, Murray could have retained the scrap for itself or retained the proceeds of the sale.

Neither was it inconsistent with Government ownership that (a) Murray was the sole judge of what materials (it was manufacturing) were defective and should be scrapped—since Murray was primarily responsible for this manufacturing operation, or (b) Murray found the customer and agreed on a price—since Murray implicitly owed a duty of good faith for and on account of the Government.

The fact that materials belonging to the Government were thus scrapped for and on the account of the Government is not inconsistent with Government title and ownership.

The Vesting of Excess or Residual Materials (for which Government does not ultimately pay) after Completion of Deliveries or Liquidation of Partial Payments.

Appellants contend (Appellants' Brief, p. 64) that the provisions of 11 (d) of the contract (Exhibit No. 2B, par. 11 (d) (R. 176)) to the effect that "upon completion of deliveries" or "upon liquidation of partial payments" title to any materials remaining shall vest in Murray, is evidence of

mere security title in the Government. This contention also is without merit.

The underlying reason for the Government's including in the partial payment-title vesting clause a provision for vesting of title in the contractor such as subparagraph (d) of paragraph 11 of the Murray letter subcontracts (R. 176) was to facilitate the disposition or storage of residual tools, supplies and materials, suitable primarily for this particular job and of little or no value to the Government, where the problem and costs of storage, housing or sale would probably exceed the value. Furthermore, the contractor or subcontractor ultimately would only be paid for the completed unit and not for excess or residual materials or supplies. The reason for the clause is set forth in 10 Code of Federal Regulations, 1945 Supp., Paragraph 803.331-A as follows:

> "Any contract which contains a partial payments article similar to that set forth in either Paragraph 803.330 or 803.231 but not containing the substance of subparagraph (d) of such article may be amended to include the substance of such subparagraph (d) in such partial payments article. **The addition of such paragraph is considered to be of advantage to the Government as simplifying and expediting the transfer and disposition of property acquired for or used in the performance of a contract and it has been determined that the making of such amendments will facilitate the prosecution of the war.** Authority is granted to the chief of each technical service to make or to authorize the making of such amendment pursuant to the First War Powers Act and Executive Order No. 9001."

It is to be noted that, **"upon completion of deliveries"** under the contract, unlike in lien or chattel mortgage situations, title in and to the completed end product continues throughout and remains vested in the United States, the purchaser, for its use for defense purposes. Only the excess or residual material not embodied in the end product vests in Murray. In a chattel mortgage situation, all of the property securing a debt, is discharged from the mortgage or lien,

and the mortgagee never gets title to any part thereof—except on foreclosure. Since the Government only pays a fixed price for the end product, it, in effect, never ultimately pays for the excess or residual material left over, for which it has no use and which has little or no value.

The revesting provision, subparagraph 11(d) of the Murray subcontracts—considered on its face, in the light of its purpose set forth in the Regulations, and as interpreted by this Court in the *Ansonia* case, supra, cannot be construed as being in any way inconsistent with the vesting of title in the Government in accordance with the express provisions of the contracts. In *United States* v. *Ansonia Brass*, 218 U.S. 452, an argument comparable to that now urged by the City was rejected. There it was contended that a clause which permitted the United States Government to reject the completed vessel and return it to the contractor was inconsistent with the express provision vesting title to the vessel in the Government during various stages of completion upon the making of a partial payment. In rejecting this contention, the Court said, at page 468:

> "Let it be conceded that **this section gave the Government the right to reject defective work or material, or even the entire dredge, if,** upon trial and before final acceptance, **it proved defective—is that right inconsistent with the vesting of title in the parts as paid for,** as specifically provided in section 211? **We think not.** It may be that in such contingency the Government might reject the dredge. This might be true consistently with the acquirement of title in parts accepted and paid for after inspection. That is, if the whole, upon final trial, proved defective, all, including the restoration of that acquired, might be within the power of the Government."

Appellants erroneously contend that this subparagraph (d) in the partial payment clause does not serve a purpose "to secure control" (Appellants' Brief, page 64). This is not so since under this clause title to all property is vested in the United States throughout the manufacturing process

until "completion of deliveries" and thus control in the Government obtains throughout until it receives the end product covered by the contract. Only excess or residual materials of no use or value to the Government vest in the contractor **after completion.** At this point control is no longer required or indicated.

The situation as to the **"liquidation of the partial payments"** —the alternate provision in subparagraph (d) relating to vesting of residual materials in the contractor—in practical operation and effect is not different from the foregoing.

The statement of the Appellants (Appellants' Brief, page 65) that a "practical operation" of the revesting provision is demonstrated by a situation where 25% of the contract price is the partial payment received and goods equivalent thereto are delivered to the Government is completely theoretical. Such a situation does not and will not obtain in the day-to-day practical and actual operation of the partial payment clause in practice. Appellants assume a situation where, notwithstanding a provision in the partial payments clause for partial payments not to exceed 90% of the cost,[33] or 75% of all costs,[33] the contractor will not receive such payments, but payments considerably less than that—to wit only 25%.

Since the performance of defense contracts of the character at bar involve the expenditure of large amounts and the completion of the contract is necessarily spread over a long period of time, in practical operation, the contractor—having the right so to do under the partial payment clause—takes down virtually as much of the purchase price as the clause permits (90% in Kaiser & 75% in Wright of costs expended) as the work progresses, rather than strain its own resources, which is neither warranted nor expected. For Appellants to

[33] 90% in the Kaiser subcontract (R. 175).

75% in the Wright subcontract (R. 219).

suggest that "in practical operation," the contractor would take down only 25% of costs expended or of the contract price is to ignore the realities of practical business operations. In the case at bar, it is undisputed that—

> ". . . as of June 30, 1953, Murray had incurred costs in the performance of said two subcontracts from the inception thereof in the aggregate amount of $16,264,771.03 against which it had received payments covering its costs aggregating $14,940,516.80, exclusive of Murray's profits on completed and delivered property."[34]
>
> (Affidavit of Mark I. Sammon, paragraph 9, (R. 52).)

This demonstrates how defense contractors are impelled by sound business practice and necessity to utilize virtually to the fullest extent their right to obtain partial payments upon the purchase price as the work progresses.

---

[34]"Of said payments of $14,940,516.80 received, $12,550,191.94 represented cost of property exclusive of Murray's profit on billings for completed and delivered products and $2,390,324.86 represented partial payments on account of work in process, not yet completed or delivered. Of the $12,550,191.94, $10,771,040.31 had originally been paid to Murray in the form of partial payments as the work progressed and the balance of $1,779,151.63 was paid from time to time as the final invoices were rendered for the completed and delivered product. This $1,779,151.63 represented the hold-back amounts (over and above said partial payments previously made) which could not be billed until completion and delivery.

"Of said aggregate costs of $16,264,771.03, as of June 30, 1953, there remained at Murray in process and uncompleted work upon which Murray had incurred costs aggregating $3,714,579.09 ($16,264,771.03, total costs, less billings of $12,550,191.94 for cost of completed and delivered products exclusive of Murray's profit) and upon which Murray had theretofore received partial payments as the work progressed in the sum of $2,390,324.86. Of the unpaid portion of Murray's costs amounting to $1,324,254.23 on such in process and uncompleted work, as of June 30, 1953 Murray had previously requested, but had not yet received, partial payments in the amount of $420,766.10."

(Affidavit of Mark I. Sammon, paragraph 9, (R. 53).)

There is no provision for repayment of the partial payments by the contractor, under the partial payment clause or under any other clause in the contract—nor was such repayment intended or contemplated. The partial payments were upon the purchase price; they were not loans where repayment was indicated. The only way in which partial payments may be "liquidated" is by delivery of completed end products.[35] Thus, with such large percentage of costs covered by partial payments, it is most unlikely that in practice, the partial payments would be completely liquidated until "completion of deliveries." This factor is ignored by Appellants. Appellants erroneously assume that in liquidating partial payments the entire amounts of the delivered price are first offset against any outstanding partial payments, which assumption is contrary to the provisions in the contract that—

> "(c) In making payment for supplies furnished hereunder, there shall be deducted from the contract price therefor the proportionate amount of the partial payments theretofore made to the contractor, under the authority herein contained." (R. 175)

(See also Air Force Procurement Instruction 54-609, reported in CCH, Government Contract Reporter, paragraph 26714.9.)

Contrary to the intimation of Appellants (Appellants' Brief, page 65) *United States* v. *Lennox* does not consider the effect of "liquidation of partial payment" by delivery or otherwise. Furthermore, in connection with the case of *United States* v. *Lennox*, it should be noted that Judge Frank's comments* (relied upon by Appellants, Appellants'

[35] Of course, if the contract is terminated by the Government for its convenience, the entire contract is settled at that time under general termination regulations, after crediting to the Government the amount of partial payments theretofore paid upon the purchase price (R.186, par. (d)).

*Judge Frank's comments appear in a separate opinion. The majority of the Court "decide this case [Lennox] solely on another ground" and therefore did not join in his opinion (p. 317).

Brief, pages 66-7) about an alleged "skillful trap" set for an "unwary" contractor, pursuant to the title vesting to thousands of dollars worth of property in the event of a partial payment of only $50.00, does not recognize the fact that had the Government obtained possession of the thousands of dollars worth of property, it would have been required to pay the value of the property taken. The transfer of title to the Government does not preclude the necessity for further payments pursuant to the terms of the contract. This is clearly indicated in that part of the partial payment clause which states:

> "Provided, that nothing herein shall deprive the contractor of any further partial or final payments due or to become due hereunder; or relieve the contractor or the Government of any of their respective rights or obligations under the contract."[38]

It is to be noted that in *America" Boiler Works*, 220 Fed. (2d) 319, supra, it was held that title vested in the United States by virtue of title vesting language in the contract even without any provision for partial or progress payments.

The vesting provision, subparagraph 11 (d) of the Murray subcontracts—considered on its face, in the light of its purpose set forth in the Regulations, and as interpreted by the United States Supreme Court in the *Ansonia* case, supra,—cannot be construed as being in any way inconsistent with the vesting of title in the Government in accordance with the express provisions of the contracts.

---

[38] As was pointed out hereinbefore, page 63, footnote 28, *United States* v. *Lemon* in effect only held that the Government in default (failing to make partial payments as required) cannot benefit by such default and terminate a contract for default brought about by its own failure.

The conduct of Murray and the prime contractors was not inconsistent with the express intention to vest absolute title and ownership in the Government and could not divest the Government of such title.

The contention of Appellants (Appellants' Brief, page 65 et seq.) that Murray followed a course of conduct, in dealing with the assessed property, inconsistent with the claim that absolute title vested in the United States is without foundation.

At the outset it should be noted that it would be a strange doctrine indeed which would permit a person dealing with Government property to divest the Government of ownership of that property by his action or course of conduct. In the case at bar, title vested in the Government by virtue of the express and unambiguous language in the contract and no action of Murray could divest the Government of such ownership or create an estoppel against it.

Appellants argue (Appellants' Brief, page 67) that possession and control, retained in actual practice by Appellee while the work was in process, is persuasive that the Government did not acquire a full, beneficial title. The same argument was made and was unequivocally rejected in *United States of America* v. *County of Allegheny*, 322 U.S. 174, 181-2.

The contention that title did not pass because "no notice was given to creditors of Appellee of the partial payment and transfer of title clauses (Point 1, Appellants' Brief, page 69) is clearly erroneous. A similar argument was urged and rejected in the *Allegheny* case (p. 182). Title was vested in the United States Government under a federal procurement statute and the Federal law governs notwithstanding any rule to the contrary which may be asserted under state law.

The fact that no written document or bill of sale transferring title to the property in question was executed and delivered by plaintiff to the Government following request for a receipt of the partial payment (Appellants' Brief, page 69,

point 2) has no bearing on this question whatsoever. Provision for the vesting of title in the United States Government is contained in the partial payment clause, and no further document transferring title is required.

The fact that the completed tools made by plaintiff under the subcontract were merely inspected, but possession thereof was retained by Murray for performance of the subcontract, (Appellants' Brief, page 69, point 3) is no authority for the proposition that title to such tools did not vest in the United States.[37]

The fact that no change was made by plaintiff in its accounting procedure after receipt of the partial payments from that which obtained before the partial payments (Appellants' Brief, page 69, point 4) and the fact that plaintiff made no change in its physical treatment of the property assessed after receipt of the partial payment, from that which obtained before (Appellants' Brief, page 70, point 6) is no support for the proposition that Murray did not consider that title vested in the Government after receipt of the initial partial payment. Since Murray intended from the very beginning to obtain partial payments under its subcontracts, it set up its own internal accounting entries and procedures from the very beginning as though partial payments had in effect been made, treating the ownership of all materials and work in process as being in the Government and the amounts due under the contracts from the Government as amounts recoverable from the Government (Stipulation No. 4, Par. 7, (R. 96)). Like

---

[37]These tools in Murray's possession on January 1, 1952, the assessment date, were **recognized** and treated **by** the **City** and **County** as **belonging to the United States** and were not assessed to Murray (Stipulation 1, Par. (4) (b) (R. 82)). It is, therefore, strange indeed that Appellants should now argue that Murray's retention of possession of such tools was inconsistent with title thereto being vested in the United States.

wise, from the outset, it is clear that Murray's aircraft operations were at all times entirely separated from its automotive and other type of operations and that from the very outset all of these defense materials were tagged, labeled and segregated by subcontract number, bearing code references to each subcontract. Therefore, no action or treatment of any different nature in the handling or segregation of this defense material was necessary after receipt of partial payments by Murray than obtained before receipt of such partial payments (See Stipulation No. 4, Par. 8 (R. 97-8)). The property was treated from the very outset as Government owned.

The contention that Murray's published Annual Report in 1951 to its stockholders and to the public—as distinguished from its internal records and operations referred to immediately hereinbefore—did not make reference to the sum of $125,000.00 as a segregated item of accounts receivable under the subcontract in question (Appellants' Brief, page 69, point 5) did not indicate that title would not vest in the United States after the partial payment requested had been received. It should be noted that the amount in question represents the total of partial payments requested prior to August 31, 1951, on which payments were received later that same year. Murray's Annual Report for 1951 is for the period ended August 31, 1951 and title to the goods on the initial partial payment request did not vest in the Government until such partial payments were received, which was subsequent to August 31, 1951.

In the succeeding Annual Report for the year ended August 31, 1952, goods on hand under these subcontracts were not included in Murray's inventory—since title was in the Government—but Murray combined all the amounts that it had expended, less those received in the form of partial payments, and classified the whole net amount as a separate item on its balance sheet (Exhibit 12 (R. 262)) which, upon advice of its

public accountants, was designated as "Total Recoverable Amounts Applicable to Government Contracts."[35]

The argument that Murray was responsible in determining whether or not scrap would be re-worked or scrapped, and if scrapped, charged to its costs, is not inconsistent with title vesting in the Government. (Appellants' Brief, page 70, point 8.) The same argument was urged and rejected in the *Ansonia* case (p. 467).

The contention that the method of shipping and consigning goods in the name of the subcontractor (Murray) as a consignor to the prime contractor as consignee is inconsistent with ownership in the Government (Appellants' Brief, page 70, point 9) is also not valid. This method of handling was merely for convenience. Certainly, Murray could not by its use of a form of bill of lading deprive the Federal Government of title to property which belonged to the Government. (See Williston on Sales, Revised Edition, Sec. 421.)

The argument that final inspection of the completed engine on aircraft at the plant of the prime contractor or at the air

---

[35]The Murray Annual Report for the Year Ending August 31, 1952, (Plaintiff's Exhibit 12, (R. 262-3)), being the first Annual Report following receipt of the first partial payment, clearly indicates that Murray did not treat or consider the partial payments as advances, loans, indebtedness or a liability of any kind. No liability is shown on the Balance Sheet for such partial payments. There is no debt and no lien to secure repayment of any debt. (See Sammon Affidavit par. 11(c) (R. 54-5); Sammon deposition, page 55.) See page 66 hereof.

Compare Murray's 1945 Annual Report (Plaintiff's Exhibit 13, (R. 268-71)) when Murray had obtained a true "advance" payment from the Government—which was a loan secured by a lien, prior to work being done—which Murray showed on its Balance Sheet as a liability—"Advance Payments Received from Prime Contractors on Costs Plus a Fixed Fee Contracts" (See Affidavit of Mark I. Sammon, Paragraph 11(c), (R. 54-5); see Sammon deposition, page 43 et seq. for handling of "advance" payments as distinguished from partial payments).

field indicates that title did not pass prior thereto (Appellants' Brief, page 70, point 10) is likewise specious. First, it is to be observed that inspection by the Government of parts made by Murray is made at the Murray plant. Furthermore, the point of inspection is not the determining factor as to the time or place when and where title vested. Title vested at the time Murray received the first partial payment under the subcontract, subject to being divested if rejected (See the *Ansonia* case on this point, 218 U.S. 452, 464-5). Likewise the argument that the right to reject and the method of handling rejected work was inconsistent with title being vested in the United States (Appellants' Brief, page 70, point 8) was also held to be ineffectual in the *Ansonia* case, 218 U.S. 452, 467.

Appellants' contention (Appellants' Brief, page 71, point 11) in respect to the method of carrying insurance was heretofore answered at pages 72-75.

Virtually every argument of Appellants in support of their contention that the conduct of the parties was inconsistent with title being vested in the United States was urged and rejected by the *Allegheny* and *Ansonia* cases. Contrary to the contention of the defendants, the conduct of the parties was not inconsistent with the express intention of the parties that title vest in the United States.

Offutt Housing v. *Sarpy*, 351 U.S. 252 (1955), relied upon by Appellants (Appellants' Brief, p. 71; also pp. 53, 55) is inapposite to the case at bar. There land owned by the United States was leased to plaintiff housing company for a seventy-five year term under the Wherry Military Housing Act, 12 U.S.C.A. Sec. 1748. The plaintiff erected buildings thereon and rented the same to military personnel and collected and retained rents therefrom.

The local taxing authorities levied a personal property tax upon the improvements and furniture (not the land) used by plaintiff. Two issues were presented to this Court:

(1) Whether Congress had consented to taxing of the property by the state; and

(2) If such consent had been given by Congress, could the entire value of the property be taxed to the plaintiff without any diminution of such value because of the Government's reversionary interest in such property.

The majority opinion held that Congress had consented to the taxation of such property by statute saying—

> "We hold **only** that Congress, in the exercise of this power, has permitted such state taxation as is involved in the present case." (p. 260)

In the instant case Congress has not consented to taxation of its property by local units of government and the constitutional immunity of such property from local taxation remains inviolate.

On the second issue the Court, having determined that state taxation was permissible by consent of Congress, held that since the life of the personal property would end before the Government would come into enjoyment, it had only a "paper title" and the full value of such property was accordingly properly assessable to plaintiff housing company, saying:

> "The lease is for 75 years; the buildings and improvements have an estimated life of 35 years. The enjoyment of the entire worth of the building and improvements will therefore be petitioner's." (p. 261)

In the instant case, entire worth of the property involved was that owned by the Government. Murray did not have the right to use the property for its own benefit and the materials and work in process were specifically manufactured to the Government's specifications for the sole use and enjoyment of the Government. Applying the rationale of the *Offutt* case to the case at bar, there can be no question that the Government was the beneficial owner of the property here involved.

There is no warrant or basis for Appellants to say (Appellants' Brief, page 72) that "we find here as in *Offutt* that the acts of the parties were inconsistent with the claim of title."

The title and beneficial ownership, in form and in substance, was vested in the United States. The Government was the purchaser of the material, made pursuant to its specifications, for its special use for defense purposes.

IV.

Was the property of the United States, in possession of Murray, immune from personal property taxes assessed by Appellants?

The Lower Court answered "Yes."

Appellee contends the answer should be "Yes."

It is the position of Appellee that—

(a) on tax assessment day absolute title—not bare security title—vested in the United States (supra, pages 62-90);

(b) the taxes assessed are ad valorem taxes **upon the property**—and are not specific or privilege taxes—though payable by the owner or person in possession;

(c) personal property of the United States is immune from ad valorem property taxation by a state or subdivision thereof, whether or not such property is in the possession of the United States, or a bailee, even though such tax is assessed to such bailee, and not to the United States. *United States* v. *Allegheny County*, 322 U.S. 174 (1944); see *Kern-Limerick, Inc.* and *United States* v. *Arkansas*, 347 U.S. 110 at 123, footnote 14; compare, *Esso Standard Oil Co.* v. *Evans*, 345 U.S. 495, at 499 and under Michigan authorities as well, *Taylor* v. *County of Genesee*, 286 Mich. 674, 677-8; *National Bank of Detroit* v. *City of Detroit*, 272 Mich. 610; Opinions of Mich. Attorney General, Jan. 17, 1936 and May 28, 1941.

These propositions are basic and controlling.

Appellants seek to avoid the impact of the controlling doctrine of the *Allegheny* case by contending that—

(a) (i) in the *Allegheny* case the Court held that

> "'This form of taxation is not regarded as a form of personal taxation, but rather as a tax against the property as a thing.' (p. 1218, 88 L. Ed.);

whereas

> (ii) " . . . our personal property tax is regarded as a form of personal taxation rather than as a tax against the property . . ."

(Appellants' Brief, page 121; also 96-107);

(b) because the City of Detroit personal property taxes are payable by the owners or person in possession—

> "The direct burden or incidence of these 'taxes' is, therefore, upon and against the independent contractor, appellee." (Appellants' Brief, p. 106.)

(c) therefore, the doctrine of constitutional immunity does not apply, citing and relying upon cases—which deal entirely with state privilege or excise taxes, except as noted hereinafter—where the incidence of the privilege or excise tax is directly upon a contractor even though such contractor may ultimately pass the economic burden on to the United States government.

Fifty-two pages of Appellants' Brief are directed to this argument (pages 77-129).

This entire argument is predicated upon the erroneous and fallacious contention of Appellants that the personal property assessment and taxes here involved are not upon the property, but upon the "owners or persons in possession."

This proposition is contrary to the law of Michigan and to the position asserted by the Corporation Counsel for the

City of Detroit in proceedings before the Supreme Court of Michigan.

The Personal Property Taxes of Appellants are Ad valorem taxes upon the property of the United States—although collection thereof is sought from Murray.*

Under Article X, Section 3, the Constitution of the State of Michigan of 1908, **only** two general methods of taxation by the State or subdivisions thereof are authorized—(1) ad valorem taxes and (2) specific or privilege taxes. *C. F. Smith Company* v. *Fitzgerald*, 270 Mich. 659, 672; *Pingree* v. *Auditor General*, 120 Mich. 95, 102, 109.

The City of Detroit personal property taxes here involved were assessed pursuant to Title VI, Chapter II, Section 1 of the Charter of the City of Detroit[39] which provides:

> "Section 1 **All** real and **personal property within the city subject to taxation by the laws of this state shall be assessed** at its true cash value by the board of assessors herein provided . . . **All taxes upon personal property** may be assessed in any district, **whether** the **person** assessed is a **resident of such district or not.**"

The **collection** of such personal property taxes—as distinguished from the assessment thereof and the power to assess the same—is provided for under Title VI, Chapter IV, Section 1, as follows:

> "Section 1. All city taxes shall be due and payable on the fifteenth day of July in each year, and on that date shall become a lien **on the property** taxed . . . The owners

---

*This is so under Michigan decisions. However, even if Michigan decisions were otherwise, "where a federal right is concerned", this Court would not be bound thereby nor "relieved from the duty of considering the real nature of the tax and its effect upon the Federal right asserted". *United States* v. *Allegheny*, 322 U.S. 174, 184; *Kern-Limerick*, supra; *Society for Savings* v. *Ohio*, supra.

[39]See Appendix C attached hereto for pertinent sections of the Charter dealing with personal property taxes.

> or persons in possession of any **personal property** shall pay all **taxes assessed thereon.**"[45]

Both the City of Detroit and County of Wayne personal property tax assessments are made subject to the authority of the General Property Tax Act of Michigan, 206 of the Public Acts of Mich. 1893, as amended (6 Mich. Stat. Anno. Sec. 7.1-7.243).

The very title to the Michigan General Property Tax Law clearly indicates that the tax is an **ad valorem property tax**—and not a privilege tax or tax upon the person—

> "An act to provide for the **assessment of property** and the levy and collection of **taxes thereon** . . ."

Section 1 of said statute provides:

> "(M.S.A. Sec. 7.1) **Property** Subject to Taxation. Section 1. The People of the State of Michigan enact, that all **property,** real and **personal, within the jurisdiction of this state,** not expressly exempted, shall be **subject to taxation.**"

In regard to taxes assessed upon the personal property of corporations, the Michigan statute reads as follows (M.S.A. Section 7.11):

> "All corporate **property** except where some other provision is made by law, shall be assessed to the corporation as to a natural person, in the name of the corporation . . ."

The personal property taxes here assessed under the statute and City charter are **ad valorem taxes upon the property**—and not specific or privilege taxes assessed against the taxpayer. See *City of Detroit* v. *Phillip*, 313 Mich. 211, 213 and *Pingree*

---

[45] 5 Mich. Stat. Anno. 1955, Sec. 5.2073 provides "that the **subjects of taxation** for municipal purposes shall be the same as for state, county and school purposes under the general law."

v. *Auditor General*, 120 Mich. 95, 102 and 109. Nevertheless, Appellants argue that the personal property tax, while admittedly an ad valorem tax, is regarded as a form of personal taxation when the person in possession is taxed and collection thereof is sought by way of action in assumpsit against him as a debt (Appellants' Brief, p. 121). This argument is completely unfounded and is contrary to the decisions of the Supreme Court of Michigan.

The **property** is the **basis** for and the **subject** of the **assessment and tax.** Only the **collection** machinery is directed against the owner or person in possession. In the very case upon which Appellants City and County rely, *City of Detroit* v. *Gray*, 314 Mich. 516, the Corporation Counsel for the City in his brief before the Supreme Court of Michigan on pages 23-24 successfully asserted:

> "Under the provisions of our Charter in an **ad valorem assessment upon personal property, the property and not the person** is assessed."[1] This Court said in the case of *Crawford v. Koch*, 169 Mich. 372, at p. 379, in part, as follows:
>
> > "*** It will be noted that here the charter provides for **the assessment being made against the property itself, rather than against the persons in possession** of the property at the time the assessment is made . . ."

Not only is this the character of the personal property tax under the City of Detroit Charter, it is also the same under the General Property Tax Law of Michigan. In re *Ever Krisp Food Products Co.*, 307 Mich. 182, at 196, the Court said:

> "Under our tax laws, the **tax assessment** and lien is specifically **upon the whole personal property** 1 Comp. Laws 1929, Sec. 3429, as amended.* [Comp. Laws Supp.

---

[1] This is directly contrary to the position now asserted by the Corporation Counsel for the City of Detroit and Counsel for the County of Wayne.

1940, Sec. 3429, Stat. Ann. Sec. 7.81]; Detroit charter, title 6, chap. 4, Sec. 1; *Crawford* v. *Koch*, 169 Mich. 372."

It is also to be noted that in the closing sentence of its opinion in the *Gray* case, the Michigan Supreme Court stated (page 521) that—

> "In the case at bar defendant as husband of the owner of the personal property was in possession of the same and is liable for the **personal property tax assessed against said property.**"

The Power to Tax is Predicated Upon Jurisdiction of the Property.

As this Court said in *United States* v. *Allegheny County*, 322 U.S. 174, supra, at page 184:

> "The **power to tax is predicated upon jurisdiction of the property,** not upon jurisdiction of the person of the owner . . ."

So, too, the power to assess the personal property tax here in question is dependent upon the situs of the property being within the jurisdiction of the taxing authority. The City Charter, Title VI, Chapter II, Section 1, provides—

> "Section 1. All real and personal **property within the city** subject to taxation by the laws of this state shall be assessed . . . All taxes upon personal property may be assessed in a district, **whether the person** assessed **is a resident** of such district **or not.**"

Likewise, under the State statute, it is provided:

> "(M.S.A. Sec. 7.1) Property Subject to Taxation. Section 1. The People of the State of Michigan enact, that all **property,** real and personal, **within the jurisdiction of this state** not expressly exempted, shall be subject to taxation."

The Michigan Supreme Court has clearly held that the situs of the property "within the City" of Detroit—even

though the owner of the property resided outside of the City was the basis for its power to assess the City of Detroit personal property tax. *City of Detroit* v. *Phillips*, 313 Mich. 211, 215, 217.

Even Assuming, Arguendo, that Appellants' Contention that the Tax is upon the Owner or Person in Possession and not upon the Property—Which is Erroneous—Since the United States is the Owner, the Tax Could not be Assessed upon it or Indirectly upon the Person in Possession.

Since the United States is the owner, it, and its property is immune from state and local ad valorem taxation. Furthermore, Appellants cannot sustain the tax by assessing Murray, as the owner, for property owned by the United States. Appellants in their brief (Appellants' Brief, p. 101) admit that—

> "a mistake in naming the owner . . . in the case of a personal property assessment . . . can be **fatal** to collection of the tax. Detroit Trust Company vs. Detroit, 269 Mich. 81; 256 NW 811."

The alternative suggestion of Appellants that a personal property tax upon property owned by the United States may validly be assessed to and upon the person in possession, even though not the owner, also lacks validity.

The Michigan statute provides for the assessment of personal property at the place "in which the **owner resides**" (Mich. Stat. Ann., Sec. 7.13), **except where the owner is a nonresident, in which event** the **assessment** is made **to the person in Michigan in possession** or control, **with a right of recovery against** the **owner,** secured by a **lien** on the property (Mich. Stat. Ann., Sec. 7.14, Par. Seventh).

The City of Detroit Charter has a provision substantially to the same effect. See Appendix E hereto, City Charter, Title 6, Chapter 4, Sec. 7.

It is to be noted that under the General Tax Law of Michigan, *Mich. Stat. Ann., Sec. 7.24*, it is also provided that

"property assessed to one **other than the owner** shall be **assessed separately** from his property and shall show in what capacity it is assessed to him, whether as agent, guardian or otherwise." In the Assessment Roll of the City of Detroit, 1952, (Defendant's Exhibit 3, R. 103), Item 639, Murray was assessed for all of its personal property ($10,139,510) plus the cash value of the Government-owned property here in question ($2,043,670), making a total assessment of $12,183,180, and was not separately assessed for the Government owned property in its possession. This indicates that the assessment as made was improperly directed to Murray as owner—not as the person in possession. See *U. S. v. Allegheny*, 322 U.S. 174, 187.

It is clear that under both the State law and the City Charter the only purpose of reaching the person in possession—in the absence of the owner—is for the purpose of **"collection"** from the owner. The person in possession is given the right to recover from the owner the tax attributable to the owner's property. See *Detroit Shipbuilding Co. v. City of Detroit*, 228 Mich. 145, supra, at 148, wherein the Court said:

> "To **assess the property** of a nonresident corporation to the corporation having possession thereof does not contravene any tax law of the city charter which has been called to our attention. Under the State law (Sec. 4008) and under the charter provisions (tit. 6, chap. 4, Sec. 1) the **collection** may be **enforced** against the one having possession, and both State law and charter, provide that having paid it the person or corporation may **recover the tax from the person** or corporation **whose legal duty it was to pay it** (1 Comp. Laws 1915, Sec. 4043; Detroit Charter, tit. 6, chap. 4, sec. 7). And the State law gives the party so assessed a lien on the property for the tax paid (sec. 4008)."

Cases Cited By Appellants Do Not Support their Contention that the Ad valorem property here in question is a tax on the person.

In their argument (Appellants' Brief, page 97) that the personal property tax here is a tax on the person and not on

the property, the appellants cite *Cooley on Taxation*, Vol. 1, 4th Ed., Sec. 24.

"The individual and not his property, pays the tax . . ."

In this section, however, Cooley was concerned with **payment** of taxes **generally,** rather than with the nature or character of such taxes. The quotation therefore lends no support to Appellants' contention that the personal property tax is not a tax on the property.

The West Michigan Lumber Co. case, 73 Mich. 459, 41 N.W. 503, cited in Appellants' Brief at page 99, held that a personal property tax was not invalidated by the fact that the township supervisor attached his warrant (to the township treasurer) to the **original** assessment roll rather than to a **copy** of the assessment roll as directed by the statute. The language quoted from this case in Appellants' Brief (pp. 99-100) has reference to **both** real and personal property taxes and does not support the distinction which Appellants seek to make between those types of taxes.

Dunitz v. *Pick Co.*, 241 Mich. 55, 216 N.W. 382, cited in Appellants' Brief at page 101, decided only the question "whether the tax lien takes precedence over a chattel mortgage executed and filed before the lien attached." The Court ruled that the question had been squarely decided in the negative by *Lucking* v. *Ballentine*, 132 Mich. 584, which held that the lien for personal property taxes was secondary to the lien of a chattel mortgage given before the assessment. An amendment to the statute now makes the tax lien superior to mortgage and other liens regardless of chronological priority. *Detroit Trust Company* v. *Detroit*, 269 Mich. 81, 256 N.W. 811, cited in Appellants' Brief at page 101, was, according to the opinion, "controlled by the issue as to priority of claims" and held that the amendment was not retroactive. (It was made retroactive by a further amend-

ment.) But, in any event, such questions as were raised in these cases are related to the matter of **collection** of the tax and do not affect the **nature** of the tax as being a tax **on property.**

Appellants cannot change the nature of the tax from one on the Government's property to a tax on Murray by devising a form of assessment "subject to prior rights of Federal Government".

Appellants argue that the tax is a personal debt of the appellee (Appellants' Brief, page 106), and that Appellants' secondary lien[*] is inferior to and "subject to prior rights of Federal Government" and, therefore, infers that the tax is not upon the Federal Government nor upon government-owned property (Appellants' Brief, pages 107-111). The fact that a valid personal property tax creates a personal debt against the taxpayer under Michigan law does not support the proposition in this case that it is a tax against Murray and not upon the Federal Government property. As has been pointed out hereinbefore, in Michigan the tax is an ad valorem **property** tax and it properly may be said here, as was said in *U.S. v. Allegheny County*, 322 U.S. 174, at 184:

> "This form of taxation is not regarded primarily as a form of personal taxation but rather as a **tax against the property as a thing.** Its procedures are more nearly analogous to procedures **in rem** than to those in personam. **While personal liability for the tax may be** and sometimes is

[*] It is to be noted that notwithstanding counsel for Appellants referring to their lien as a secondary lien, as being "subject to prior rights of Federal Government,"—the Michigan Statute (*Mich. Stat. Ann., Sec. 7.81*) specifically provides—

> "The personal property taxes hereafter levied or assessed by any city or village shall be a **first lien, prior, superior** and **paramount to any other claims, liens and encumbrances whatsoever** upon the personal property assessed as herein provided, any provisions in the charter of such cities or villages to the contrary notwithstanding."

> **imposed,** the **power to tax is predicated upon jurisdiction**[43] **of the property,** not upon jurisdiction of the person of the owner, . . ."

In respect to the contention that the County and City tax lien would be secondary to that of the Federal Government's lien (which Appellants assert the Federal Government has instead of absolute title) it may properly be said here, as was said in the *Allegheny* case at page 187:

> "But **renunciation of any lien on Government property** itself, which could not be sustained in any event, **hardly establishes that it is not being taxed."**[44]

Every contention here made by the City is directly contrary to the controlling principle announced in *United States* v.

---

[43]Appellants' argument (Appellants' Brief, pages 103-105) that "the provision for lien does not change the character of assessment" is and the authorities cited therein are completely inapposite to the case at bar. The nature and character of the personal property here involved must be determined by reference to the Michigan statutes and not by reference to the statutes and decisions of other jurisdictions. Clearly the Michigan personal property tax is dependent upon the property having a situs within the territorial limits of the taxing authority and is by any test a tax upon the property, not the person. (See pages 95-6, supra.)

[44]The City of Detroit cites *S.R.A.* v. *Minnesota*, 327 U. S. 558 and *Edward Hines Lumber Co.*, 248 P. 2d 720 and *New Brunswick* v. *United States*, 276 U.S. 547 (Appellants' Brief, pages 107-110), for the proposition that the Federal government is protected by the City stating on the assessment role that the assessment was "subject to prior rights of the Federal government." These cases do not stand for that proposition at all. They merely hold that where the Federal government has sold property on contract and retained only a bare vendor's security lien to assure payment of the purchase price, that a State ad valorem tax assessed upon the interest of the vendee in such property was valid, subject to the paramount rights of the government. In those cases the Federal government retained no beneficial interest in the property whatsoever. In the case at bar the Federal government was the purchaser—and not the seller—and was vested with both the legal title as well as with the full beneficial interest in the property. See supra, page 68, footnote 29.

Allegheny County, 322 U.S. 174, in which the Court held:

> "We think, however, that the Government's property interests are not taxable either to it or to its bailee (page 187) . . . Actual possession and custody of Government property nearly always are in someone who is not himself the Government but acts in its behalf and for its purposes . . . Neither he nor the Government can be taxed for the Government's property interest . . . pages 187-8) . . .

> "We hold that Government-owned property, to the full extent of the Government's interest therein, is immune from taxation, either as against the Government itself or as against one who holds it as a bailee." (Page 189.)

The Allegheny case is here controlling. The tax and the incidence thereof is upon the property of the United States which is immune from ad valorem taxation by a State or subdivision thereof.

The "direct burden or incidence rule" relied upon by Appellants applies primarily to privilege or excise tax cases, which are here inapposite. Appellants in support of their contention that the incidence of the personal property tax in the instant case is upon Murray and not upon the Federal government cite and rely upon *Esso Standard Oil Company* v. *Evans*, 345 U.S. 495; *James* v. *Dravo*, 302 U.S. 134; *Alabama* v. *King & Boozer*, 314 U.S. 1; *Graves* v. *New York*, 306 U.S. 466; *Helvering* v. *Mountain Products Corporation*, 303 U.S. 376; *Oklahoma Tax. Comm.* v. *Texas Co.*, 336 U.S. 342 (Appellants' Brief, pages 85,-87).

It is significant indeed that each of these cases involved excise or privilege taxes, for a privilege exercised by the contractor, where the incidence of such privilege tax was upon the contractor, although the economic burden was subsequently passed by such contractor to the Government. These privilege taxes are basically different in character and must be distin-

guished from an ad valorem property tax upon the property —title to which is vested in the United States—where the incidence is directly and solely upon the property assessed.

In the *Esso* case, relied upon by Appellants, the Court distinguished between the assessment of ad valorem property taxes upon property title to which was vested in the United States Government and excise or privilege taxes imposed upon a privilege granted to a private contractor, although the ultimate economic burden falls upon the Government. The Court in the *Esso* case said, at page 499:"

> "*Allegheny County*, however, was quite different. The United States had leased certain machinery to the Mesta Machine Company. In imposing the state **ad valorem property tax,** Pennsylvania included in the Mesta assessment both the privately owned land and buildings, and the government machinery. *Id.* at 179-180, 186. So the value of the federal property was, in part, the measure of the tax. We held the substance of this procedure was 'to lay an **ad valorem general property tax on property owned by the United States,**' id., at 187 **and therefore invalid. Our holding was not 'dependent upon the ultimate resting place of the economic burden of the tax.'** *Id.*, at 189.
>
> "This tax was imposed because Esso stored gasoline. It is not, as the *Allegheny County* tax was, based on the worth of the government property. Instead, the amount collected is graduated in accordance with the exercise of Esso's privilege to engage in such operations; so it is not 'on' the federal property as was Pennsylvania's. Federal ownership of the fuel will not immunize such a private contractor from the tax on storage. It may generally, as it did here, burden the United States financially. But since *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 151, this has been no fatal flaw."

To same effect see *Federal Reserve Bank* v. *Revenue Department*, 339 Mich. 587, at 597-8.

The so-called direct burden and incidence tests are applied to privilege taxes in *Draco, King & Boozer, Graves and Helvering* v. *Mountain Products Corporation*. This test and these cases like the *Esso* case are not applicable to cases involving ad valorem taxes upon property owned by the United States.

The ad valorem personal property tax in the case at bar is levied upon the property owned by the United States just as it was in the *Allegheny* case. Accordingly, the contention of Appellants that the incidence of the tax is upon Murray rather than the Government is fallacious. The legal incidence of the tax cannot be shifted to Murray by the City's erroneous assessment to Murray of Government-owned property which is immune from taxation. The complete and absolute ownership of such property was vested in the Government on assessment day. The tax was directly upon the property and the incidence of the tax fell directly upon the property and upon the Government which owned the property.

As recently as February, 1954, the Court in *Kern-Limerick* v. *Scurlock*, 347 U.S. 110 at 123, expressly stated:

> " . . . the form of contracts, when governmental immunity is not waived by Congress, may determine the effect of state taxation on federal agencies, for **decisions consistently prohibits taxes levied on the property** or purchases **of the Government itself."**

citing *United States* v. *Allegheny County*, 322 U.S. 174.

The doctrine of the *Allegheny* case is still here controlling.

There is No Support for Appellants' Attempt to avoid the impact of immunity under Ansonia and Allegheny.

Appellants' contention that the Government owned property here in question is subject to taxation, under some supposed limitation on the doctrine of constitutional immunity purportedly announced in *Thompson* v. *Union Pacific R.R.*

Co., 76 U.S. 579, 16 Wall. 579 (1869) and *Union Pacific R.R. Co.* v. *Peniston*, 85 U.S. 5, 18 Wall. 5 (1873) is completely unsupported. Each of these cases involved taxation of property which was "neither in whole nor in part the property of the Government" (*Union Pacific R.R. Co.* v. *Peniston*, p. 32). As stated by this Court in *U.S.* v. *Allegheny County*, 322 U.S. 174,186—

> "We have not held either that the Government could be taxed or its contractors taxed because property of the Government was in their hands."

We are not here concerned with cases involving the taxation of property not belonging to the United States, but where the claim is asserted that the **operation or instrumentalities** of the Government are nevertheless interfered with. Notwithstanding, the difference between such cases and the one at bar Appellants nevertheless contend that the "Substance and effect of this tax do not constitute Interference with operations of Government" (Appellants' Brief, pp. 113-120).

Here, as in *Allegheny*, we are concerned primarily with a State tax upon Government owned **property.** Here, title and ownership to the **property** being **vested in the Government,** immunity from state taxation obtains, unless waived by Congress. The Government in its procurement program and policy has long provided for such title and ownership under partial payment clauses in procurement contracts and since *Ausonia*, such title in the Government, has resulted in immunity from state tax and liens.

For Appellants now to suggest that immunity does not here obtain and that the Government does not seek control over defense work in process, because the contractor requests the partial payments (Appellants' Brief, pp. 116-119) and that "immunity" cannot "be turned on and off by individuals like a water faucet" (Appellants' Brief, page 119) is to deny *Ausonia* and this Appellants have nowhere directly attempted to do. Appellants, in effect attempt to re-argue what *Kern-*

Limerick rejected. The contention of the State there was that the power of a government official to provide for an agency buying arrangement in a procurement contract could not thereby secure immunity. This Court held otherwise.

Furthermore, to suggest that the partial payment-title vesting clause is one where the contractor seeks payments (with the resultant vesting of title in the United States) or not, at its whim and caprice, is to ignore the practical, day to day, operation of the clause and the impelling necessity which assures that wherever the clause is used it will be invoked, partial payments will be made and title will vest in the Government. As we pointed out hereinbefore, at pages 80-81, since the performance of defense contracts of the character at bar involve the expenditure of large amounts and the completion of the contract is necessarily spread over a long period of time, in practical operation, the contractor—having the right so to do under the partial payment clause—takes down virtually as much of the purchase price as the clause permits (90% in Kaiser & 75% in Wright of costs expended), as the work progresses, rather than strain its own resources, which is neither warranted nor expected. The operation of the clause at Murray, in the case at bar, where Murray was paid $14,940,516 of an aggregate amount of costs of $16,264,771 as of June 30, 1953, demonstrates how defense contractors are impelled by sound business practice and necessity to utilize virtually to the fullest extent their right to obtain partial payments upon the purchase price as the work progresses.

Thus, when the Government uses partial payment-title vesting clauses in over 80% of its Air Force Procurement contracts for aircraft, it is virtually a certainty that partial payments will be made and title will vest in the Government in almost every instance.

Appellants fail to answer *Ansonia* and attempt futilely to distinguish *Allegheny*. Appellants' attempt to distinguish

Allegheny (Appellants' Brief, pp. 120-126) amounts to no more than their own criticism of and statement of dissatisfaction with the Court's decision. Their contention that the "incidence" of an ad valorem property tax is not upon the property but upon the person to whom the tax bill is sent is contrary to the fundamental law of taxation, the Constitution and statutes of the State of Michigan, the Detroit City Charter and the entire trend of judicial decisions.

CONCLUSION

The subcontracts here in question are an integral part of the Air Force Procurement program and are inextricably tied to the prime contracts. The Government appropriately reserved unto itself certain rights and powers over the subcontracts by clear and explicit language in the prime contracts. This is entirely consonant with the expressed statutory authority contained in Section 4(a) of the Armed Services Procurement Act (41 U.S.C.A. 133) permitting the Contracting Officer to enter into any type of contract which "will promote the best interests of the Government." Exercising such authority and discretion, partial payment clauses with the vesting of absolute title in the Government were specifically provided for in the Murray subcontracts—just as they are provided for in over 80% of the prime and subcontracts entered into by the United States Air Force.

Counsel for the Appellants would change the express provisions of the contracts. They would override the clearly stated intention of the parties that absolute title vest in the Government upon receipt of a partial payment. The contracts are as clear as English words can make them. The title to all parts, materials, inventories and work in process vested in the Government upon Murray's receipt of a partial payment with no ifs, ands or buts.

Appellants cannot rewrite or distort basic military procurement policy of the United States. This policy contem-

plated that partial payments would be made upon the purchase price as the work progressed, with title and control over the vital defense materials at all times reposing absolutely in the United States Government. Such ownership and control were deemed important and essential.

On January 1, 1952 the United States Government was the owner of the defense property and materials here in question. The immunity from state and local ad valorem taxation, which attaches to such ownership by the Federal Government, is safeguarded under our Constitution and form of government.

Congress has the power by express legislation to waive such tax immunity. So far it has declined to do so in connection with the procurement of defense materials. As stated in *United States* v. *Allegheny County*, 322 U.S. 174, at 177:

> "... unshaken, rarely questioned, ... is the principle that possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation."

Appellants contend that to apply the doctrine of immunity would result in hardship and inequities. As this Court has always recognized—

> "The equities in this unfortunate conflict between the United States and one of its most important industrial communities are not capable of judicial ascertainment or equalization ...
>
> "... our constitutional system as judicially interpreted from the beginning leaves no room for the localities to impose either compensatory or retaliatory taxation on Government property interests. Their remedy lies in

petition to the Federal Congress, which also is their Congress."[45] *U. S. v. Allegheny County*, 322 U.S. 174, 190-91.

---

[45]Congress is indeed aware that the use of partial-payment-title vesting clauses is widespread and that such clauses impart tax immunity to the property acquired for the national defense. Hearing before the Committee on Government Operations, United States Senate, 84th. Congress, 1st. Session, Part I, Appendix II, page 200 (1955).

The entire question of immunity of Government-owned property, real and personal, work in process, as well as instrumentalities of Government and the impact upon State and local taxing units, and the United States has received and is now receiving thorough and comprehensive study and consideration. See Hearings, Reports and Proposed Legislation, 84th. Congress, 1st. Session, Parts I and II, (1955).

See also Report of the Interdepartmental Committee for the Study of Jurisdiction in Federal Areas within the State, Parts 1 and 2. Part 1 submitted to Attorney General and transmitted to President April, 1953 captioned The Facts and Committee Recommendations. Part 2—The Text of the Law of Legislative Jurisdiction, transmitted to the Attorney General and President, June, 1957.

As the Court has said, whether or not and to what extent immunity is waived is solely for Congress to determine.

The Appellee, The Murray Corporation of America, respectfully prays that the judgment of the District Court as affirmed by the Court of Appeals be affirmed.

Respectfully submitted,

Victor W. Klein

William M. Saxton

Attorneys for Appellee

The Murray Corporation of America

APPENDIX "A"

Chapter 3—Procurement of Supplies and Services by Armed Services—C65, 62 Stat. 21, et seq., 41 U. S. C. A. 151 et seq.

Section 151. Purchases and contracts for supplies and services —(a) Applicability to all Armed Services.

The provisions of this chapter shall be applicable to all purchases and contracts for supplies or services made by the Department of the Army, the Department of the Navy, the Department of the Air Force, the United States Coast Guard, and the National Advisory Committee for Aeronautics (each being hereinafter called the agency), for the use of any such agency or otherwise, and to be paid for from appropriated funds.

. . . . . .

Advertising requirements; exception of certain purchases and contracts from requirements.

(c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section 152 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if—

(1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress;

. . . . . .

(10) for supplies or services for which it is impracticable to secure competition;

. . . . . .

Section 153.

Except as provided in subsection (b) of this section, contracts negotiated pursuant to section 151 (c) of this title may be of any type which in the opinion of the agency head will promote the best interests of the Government. Every contract negotiated pursuant to section 151(c) of this title

shall contain a suitable warranty, as determined by the agency head, by the contractor that no person or selling agency has been employed or retained to solicit or secure such contract upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business, for the breach or violation of which warranty the Government shall have the right to annul such contract without liability or in its discretion to deduct from the contract price or consideraton the full amount of such commission, percentage, brokerage or contingent fee.

(c)—All contracts negotiated without advertising pursuant to an authority contained in this chapter shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall until the expiration of three years after final payment have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts. Feb. 19, 1948, c. 65, Sec. 4, 62 Stat. 23; Oct. 31, 1951, c. 652, 65 Stat. 700.

. . . . . .

APPENDIX "B"

Armed Services Procurement Regulations (A.S.P.R.) 5-407.2 (1), (1947 Supplement Code of Federal Regulations Title 10, Chapter VIII, Paragraphs 805.407-2, Effective November 1, 1947, Printed in 12 F. R. 7693).

Sec. 805.407-2 *Partial Payments*—(a) *When payments are not to exceed 75 per cent of the cost of the property.* In those cases where it is contemplated that partial payments in an

amount not to exceed 75 per cent of the cost to the contractor of the property will be made, the contract will contain the following article:

Partial payments: Partial payments, which are hereby defined as payments prior to delivery, on work in progress for the Government under this contract, may be made upon the following terms and conditions.

(a) The Contracting Officer may, from time to time, authorize partial payments to the Contractor upon property acquired or produced by it for the performance of this contract: *Provided*, That such partial payments shall not exceed 75 per cent of the cost to the Contractor of the property upon which payment is made, which cost shall be determined from evidence submitted by the Contractor and which must be such as is satisfactory to the Contracting Officer: *Provided further*, That in no event shall the total of unliquidated partial payments (see (c) below) and of unliquidated advance payments, if any, made under this contract, exceed 80 per cent of the total contract price of supplies still to be delivered.

(b) Upon the making of any partial payment under this contract, title to all parts, materials, inventories, work in process and non-durable tools theretofore acquired or produced by the Contractor for the performance of this contract, and properly chargeable thereto under sound accounting practice shall forthwith vest in the Government; and title to all like property thereafter acquired or produced by the Contractor for the performance of this contract, and properly chargeable thereto as aforesaid shall vest in the Government forthwith upon said acquisition or production: *Provided*, That nothing herein shall deprive the Contractor of any further partial or final payments due or to become due here-

under; or relieve the Contractor or the Government of any of their respective rights or obligations under this contract.

(c) In making payment for the supplies furnished hereunder, there shall be deducted from the contract price therefor a proportionate amount of the partial payments theretofore made to the Contractor, under the authority herein contained.

(d) It is recognized that property (including, without limitation completed supplies, spare parts, drawings, information, partially completed supplies, work in process, materials, fabricated parts and other things called for herein) title to which is or may hereafter become vested in the Government pursuant to this Article will from time to time be used by or put in the care, custody or possession of the Contractor in connection with the performance of this contract. The Contractor, either before or after receipt of notice of termination at the option of the Government, may acquire or dispose of property to which title is vested in the Government under this Article, upon terms approved by the Contracting Officer, provided, that after receipt of notice of termination, any such property that is a part of termination inventory may be acquired or disposed of only in accordance with the provisions of the termination article of this contract and the applicable laws and regulations. The agreed price (in case of acquisition by the contractor) or the proceeds received by the contractor (in case of any other disposition), shall, to the extent that such price and proceeds do not exceed the unliquidated balance of partial payments hereunder, be paid or credited to the Government as the Contracting Officer shall direct, and such unliquidated balance shall be reduced accordingly. Current production scrap may be sold by the Contractor without approval of the Contracting Officer but the proceeds will be applied as provided in this paragraph

(d), provided that any such scrap which is a part of termination inventory may be sold only in accordance with the provisions of the termination article of this contract and applicable laws and regulations. Upon liquidation of all partial payments hereunder or upon completion of deliveries called for by this contract, title to all property (or the proceeds thereof) which has not been delivered to and accepted by the Government under this contract or which has not been incorporated in supplies delivered to and accepted by the Government under this contract and to which title has vested in the Government under this Article shall vest in the Contractor.

(e) The article of this contract captioned "Liability for Government-furnished Property" and any other provision of this contract defining liability for Government-furnished property shall be inapplicable to property to which the Government shall have acquired title solely by virtue of the provisions of this Article. The provisions of this Artcle shall not relieve the Contractor from risk of loss or destruction of or damage to property to which title vests in the Government under the provisions hereof.

(f) If this contract (as heretofore or hereafter supplemented or amended) contains provision for Advance Payments, and in addition if at the time any partial payment is to be made to the Contractor under the provisions of this partial payments article any unliquidated balance of advance payments is outstanding, then notwithstanding any other provision of the Advance Payments Article of this contract the net amount; after appropriate deduction for liquidation of the advance payment, of such partial payment shall be deposited in the special bank account or accounts maintained as required by the provisions of the Advance Payments Article, and shall thereafter be withdrawn only pursuant to such provisions.

Appendix "B"

(h) *When payments are not to exceed 90 per cent of direct labor and material costs.* In those cases where it is contemplated that partial payments in an amount not to exceed 90 per cent of the direct labor and material costs to the contractor will be made, the contract will contain the following article:

Partial payments. Partial payments, which are hereby defined as payments prior to delivery, on work in progress for the Government under this contract, may be made upon the following terms and conditions.

(a) The Contracting Officer, may, from time to time, authorize partial payments to the Contractor upon property acquired or produced by it for the performance of this contract: *Provided*, That such partial payments shall not exceed 90 per cent of the direct labor and direct material costs to the Contractor of the property upon which payment is made, which costs shall be determined from evidence submitted by the Contractor and which must be such as is satisfactory to the Contracting Officer; *Provided further*, That in no event shall the total of unliquidated partial payments (see (c) below) and of unliquidated advance payments, if any, made under this contract, exceed 80 per cent of the contract price of supplies still to be delivered.

(b) Upon the making of any partial payment under this contract, title to all parts, materials, inventories, work in process and non-durable tools theretofore acquired or produced by the Contractor for the performance of this contract, and properly chargeable thereto under sound accounting practice, shall forthwith vest in the Government; and title to all like property thereafter acquired or produced by the Contractor for the performance of this contract and properly chargeable thereto as aforesaid shall vest in the Government

forthwith upon said acquisition or production: *Provided*, That nothing herein shall deprive the Contractor of any further partial or final payments due or to become due hereunder; or relieve the Contractor or the Government of any of their respective rights or obligations under this contract.

(c) In making payment for the supplies furnished hereunder, there shall be deducted from the contract price therefor a proportionate amount of the partial payments theretofore made to the Contractor, under the authority herein contained.

(d) It is recognized that property (including, without limitation, completed supplies, spare parts, drawings, information, partially completed supplies, work in process, materials, fabricated parts and other things called for herein) title to which is or may hereafter become vested in the Government pursuant to this Article will from time to time be used by or put in the care, custody or possession of the Contractor in connection with the performance of this contract. The Contractor, either before or after receipt of notice of termination at the option of the Government, may acquire or dispose of property to which title is vested in the Government under this Article, upon terms approved by the Contracting Officer, provided, that, after receipt of notice of termination, any such property that is a part of termination inventory may be acquired or disposed of only in accordance with the provisions of the termination article of this contract and applicable laws and regulations. The agreed price (in case of acquisition by the contractor) or the proceeds received by the Contractor (in case of any other disposition), shall, to the extent that such price and proceeds do not exceed the unliquidated balance of partial payments hereunder, be paid or credited to the Government as the Contracting Officer shall direct; and such unliquidated balance shall

be reduced accordingly. Current production scrap may be sold by the Contractor without approval of the Contracting Officer but the proceeds will be applied as provided in this paragraph (d), provided that any such scrap which is a part of the termination inventory may be sold only in accordance with the provisions of the termination article of this contract and applicable laws and regulations. Upon liquidation of all partial payments hereunder or upon completion of deliveries called for by this contract, title to all property (or the proceeds thereof) which has not been delivered to and accepted by the Government under this contract or which has not been incorporated in supplies delivered to and accepted by the Government under this contract and to which title has vested in the Government under this Article shall vest in the Contractor.

(e) The article of this contract captioned "Liability for Government-furnished Property" and any other provision of this contract defining liability for Government-furnished property shall be inapplicable to property to which the Government shall have acquired title solely by virtue of the provisions of this Article. The provisions of this Article shall not relieve the Contractor from risk of loss or destruction or of damage to property to which title vests in the Government under the provisions hereof.

(f) If this contract (as heretofore or hereafter supplemented or amended) contains provision for Advance Payments, and in addition if at the time any partial payment is to be made to the Contractor under the provisions of this partial payments article any unliquidated balance of advance payments is outstanding, then notwithstanding any other provision of the Advance Payments Article of this contract the net amount, after appropriate deduction for liquidation of the advance payment, of such partial payment shall be

deposited in the special bank account or accounts maintained as required by the provisions of the Advance Payments Article, and shall thereafter be withdrawn only pursuant to such provisions.

APPENDIX "C"

Armed Services Procurement Regulations, 32 Code of Federal Regulations, 1949 Ed., 1950 Pocket Supp., Chap. IV, Sub-part E, Section 402.501.

Nature of Advance Payments. Advance payments shall be deemed to be payments made by the Government to a contractor in the form of loans or advances prior to and in anticipation of complete performance under a contract. Advance payments are to be distinguished from "partial payments" and "progress payments" and other payments made because of performance or part performance of a contract.

APPENDIX "D"

Michigan General Property Tax Act

Compiled Laws of Michigan, 1948, Section 211.1 (Mich. Stat. Anno., Vol. 6, Sec. 7.1)

"211.1 Property subject to taxation:

"Sec. 1. That all property, real and personal, within the jurisdiction of this state, not expressly exempted, shall be subject to taxation."

Compiled Laws of Michigan, 1948, Section 211.10 (Mich. Stat. Anno., Vol. 6, Sec. 7.10)

"211.10 Annual Assessment

Appendix "D"

"Sec. 10. An assessment of all the property in the state, liable to taxation, shall be made annually in the several townships, villages and cities thereof by the supervisors of the several townships and wards, or in villages and cities where provision is made in the acts of incorporation or charter for some other assessing officer, then by such assessing officer, as hereinafter provided."

Compiled Laws of Michigan, 1948, Section 211.40

(Mich. Stat. Anno., Vol. 6, Sec. 7.81)

"211.40 Property taxes; lien, priority.

"Sec. 40. The taxes thus assessed shall become at once a debt due to the township, city, village and county from the persons to whom they are assessed, and the amounts assessed on any interest in real property shall, on the first day of December, for state, county, village or township taxes or upon such day as may be heretofore or hereafter provided by charter of a city or village, become a lien upon such real property, and the lien for such amounts, and for all interest and charges thereon, shall continue until payment thereof. And all personal taxes hereafter levied or assessed shall also be a first lien, prior, superior and paramount, on all personal property of such persons so assessed from and after the first day of December in each year for state, county, village or township taxes or upon such day as may be heretofore or hereafter provided by charter of a city or village, and so remain until paid, which said tax liens shall take precedence over all other claims, encumbrances and liens upon said personal property whatsoever, whether created by chattel mortgage, title retaining contract, execution, or upon any other final process of a court, attachment, replevin, judgment or otherwise, and whether such liens, claims and encumbrances created by chattel mortgage, title retaining

contract, execution or upon any other final process of a court, attachment, replevin, judgment or otherwise, become effective prior to the effective date of this act or subsequent thereto, and no transfer of personal property assessed for taxes thereon shall operate to divest or destroy such lien, except where such personal property is actually sold in the regular course of retail trade. The personal property taxes hereafter levied or assessed by any city or village shall be a first lien, prior, superior and paramount to any other claims, liens and encumbrances whatsoever upon the personal property assessed as herein provided, any provisions in the charter of such cities or villages to the contrary notwithstanding."

APPENDIX "E"

CHARTER OF THE CITY OF DETROIT

TITLE VI

CHAPTER II

Assessments-General

. . . . . .

Assessments; Districts; Rolls:

Section 1. All real and personal property within the city subject to taxation by the laws of this state shall be assessed at its true cash value by the board of assessors herein provided. Assessments shall be made according to assessment districts, the boundary lines of which shall conform to ward boundaries as established from time to time by the common council. There shall be an assessment roll in book form for each such district. All taxes upon personal property may be assessed in any district, whether the person assessed is a resident of such district or not.

TITLE VI

CHAPTER IV

TAXES

Date Payable; Liability for Payment:

Section 1. All city taxes shall be due and payable on the fifteenth day of July in each year, and on that date shall become a lien on the property taxed. The owners or occupants or parties in interest to any real estate assessed hereunder shall be liable to pay such taxes, and all assessments levied in accordance herewith. The owners or persons in possession of any personal property shall pay all taxes assessed thereon.

. . . . . .

Persons in Possession Liable for Tax:

Sec. 7. In case any person by agreement or otherwise ought to pay such tax, or any part thereof, the person in possession who shall pay the same may recover the amount from the person who ought to have paid the same, in an action of assumpsit as for moneys paid out and expended for his benefit, or may deduct the amount from any rent due or to become due to the person who should have paid such tax.

Collection of Taxes on Personal Property:

Sec. 26. On and after the twenty-sixth day of August in each year and at any time until the taxes mentioned herein are paid, the City Treasurer shall enforce the collection of all unpaid taxes which are assessed against the property or value other than real estate. If such taxes shall remain unpaid the City Treasurer shall forthwith levy upon and sell at public auction the personal property of any person refusing or neglecting to pay such tax, or collect the same through the courts. Six days' notice of any such sale shall be given by the City Treasurer by publication in the official newspaper. Whenever such sale shall have been made the proceeds thereof shall be applied to the payment of the taxes and percentage and the expense of such sale, and any surplus remaining there-

after shall be paid over to the owner of such property or other person entitled to receive the same. The City Treasurer shall have power in the name of the City to prosecute any person or corporation refusing or neglecting to pay such taxes or any special assessment by a suit in the Circuit Court for the County of Wayne, and he shall have, use and take all lawful ways and means provided by law for the collection of debts to enforce the payment of any such tax or any special assessment. The tax rolls or unit cards after the tax has been transferred thereto shall be prima facie evidence of the indebtedness of such person and the regularity of the proceedings by which such tax or assessment was assessed and levied. All city taxes upon personal property shall become on said fifteenth day of July a lien thereon and so remain until paid, and no transfer of the personal property assessed shall operate to divest or destroy such lien (As amended April 5, 1937. In effect April 14, 1937.)

Taxes a Debt:

Sec. 27. All city taxes upon personal property and real estate and special assessments thereon in addition to being a lien upon the property assessed shall become a debt against the owner from the time of the listing of the property for assessment, and shall remain a debt against the owner of the property or his estate after his death, until the same are paid.

APPENDIX "F"

Compiled Laws of Michigan, 1948, Section 117.3 (Mich. Stat. Anno., Vol. 4, Section 5.2073).

Home Rule Cities

Mandatory charter provisions.

* * * *

Taxation. (f) That the subjects of taxation for municipal purposes shall be the same as for state, county and school purposes under the general law.